741

UNITED STATES REPORTS

VOLUME 417

CASES ADJUDGED

IN

THE SUPREME COURT

AT

OCTOBER TERM, 1973

MAY 20 (CONCLUDED) THROUGH (IN PART) JUNE 24, 1974

HENRY PUTZEL, jr.
REPORTER OF DECISIONS

UNITED STATES
GOVERNMENT PRINTING OFFICE
WASHINGTON : 1976

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ERRATA

416 U. S. 284 n. 13, line 3: a comma should be inserted before "*post.*"

416 U. S. 766 n. 5, line 2 from bottom: "*case*" should be "case."

416 U. S., Reporter's Note preceding page 901, line 2: "652" should be "866."

JUSTICES

OF THE

SUPREME COURT

DURING THE TIME OF THESE REPORTS

WARREN E. BURGER, Chief Justice.
WILLIAM O. DOUGLAS, Associate Justice.
WILLIAM J. BRENNAN, Jr., Associate Justice.
POTTER STEWART, Associate Justice.
BYRON R. WHITE, Associate Justice.
THURGOOD MARSHALL, Associate Justice.
HARRY A. BLACKMUN, Associate Justice.
LEWIS F. POWELL, Jr., Associate Justice.
WILLIAM H. REHNQUIST, Associate Justice.

RETIRED

EARL WARREN, Chief Justice.
STANLEY REED, Associate Justice.
TOM C. CLARK, Associate Justice.

OFFICERS OF THE COURT

WILLIAM B. SAXBE, Attorney General.
ROBERT H. BORK, Solicitor General.
MICHAEL RODAK, Jr., Clerk.
HENRY PUTZEL, jr., Reporter of Decisions.
FRANK M. HEPLER, Marshal.
EDWARD G. HUDON, Librarian.

SUPREME COURT OF THE UNITED STATES

ALLOTMENT OF JUSTICES

It is ordered that the following allotment be made of the Chief Justice and Associate Justices of this Court among the circuits, pursuant to Title 28, United States Code, Section 42, and that such allotment be entered of record, *viz.:*

For the District of Columbia Circuit, WARREN E. BURGER, Chief Justice.

For the First Circuit, WILLIAM J. BRENNAN, JR., Associate Justice.

For the Second Circuit, THURGOOD MARSHALL, Associate Justice.

For the Third Circuit, WILLIAM J. BRENNAN, JR., Associate Justice.

For the Fourth Circuit, WARREN E. BURGER, Chief Justice.

For the Fifth Circuit, LEWIS F. POWELL, JR., Associate Justice.

For the Sixth Circuit, POTTER STEWART, Associate Justice.

For the Seventh Circuit, WILLIAM H. REHNQUIST, Associate Justice.

For the Eighth Circuit, HARRY A. BLACKMUN, Associate Justice.

For the Ninth Circuit, WILLIAM O. DOUGLAS, Associate Justice.

For the Tenth Circuit, BYRON R. WHITE, Associate Justice.

January 7, 1972.

(For next previous allotment, see 403 U. S., p. IV.)

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CASES ADJUDGED

IN THE

SUPREME COURT OF THE UNITED STATES

AT

OCTOBER TERM, 1973

NATIONAL LABOR RELATIONS BOARD *v.* FOOD STORE EMPLOYEES UNION, LOCAL 347, AMALGAMATED MEAT CUTTERS & BUTCHER WORKMEN OF NORTH AMERICA, AFL–CIO

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 73–370. Argued March 18–19, 1974—Decided May 20, 1974

After finding that Heck's Inc. had engaged in pervasive unfair labor practices, the National Labor Relations Board (NLRB) issued a cease-and-desist order against it, but rejected the argument of respondent union, the charging party, for additional remedies, including reimbursement of litigation expenses and excess organizational costs incurred as a result of Heck's illegal conduct. The Court of Appeals enforced the NLRB's order but remanded the case to the NLRB for further consideration of additional remedies. The NLRB again refused to order reimbursement of litigation expenses and excess organizational costs, reasoning that its "orders must be remedial, not punitive, and collateral losses are not considered in framing a reimbursement order" and that the Board, not the charging party, is entrusted with primary responsibility to protect the public interest. The Court of Appeals enforced the NLRB's amended order but, concluding that the NLRB

had meanwhile in *Tüdee Products, Inc.*, 194 N. L. R. B. 1234, changed its policy, enlarged the NLRB's order by requiring Heck's to "[p]ay to the Union any extraordinary organizational costs which the Union incurred by reason of Heck's policy of resisting organizational efforts and refusing to bargain" and to "[p]ay to the Board and the Union the costs and expenses incurred by them" in connection with the litigation. Sections 10 (e) and (f) of the National Labor Relations Act authorize courts of appeals to "make and enter a decree . . . modifying and enforcing as so modified" an NLRB order. *Held:* The Court of Appeals, although properly refusing to resolve inconsistencies in the Board's decisions in this case and in *Tüdee* by accepting Board counsel's rationalizations, erroneously exercised its authority under §§ 10 (e) and (f), since it was "incompatible with the orderly function of the process of judicial review" (*NLRB* v. *Metropolitan Life Ins. Co.*, 380 U. S. 438, 444) for that court to enlarge the Heck's order without first affording the NLRB an opportunity to evaluate this case in the light of the policy enunciated in *Tüdee* and to decide whether that policy should be applied retroactively. Pp. 8–11.

155 U. S. App. D. C. 101, 476 F. 2d 546, reversed and remanded.

BRENNAN, J., delivered the opinion for a unanimous Court.

Deputy Solicitor General Friedman argued the cause for petitioner. On the brief were *Solicitor General Bork, Mark L. Evans, Peter G. Nash, John S. Irving, Patrick Hardin, Norton J. Come,* and *Linda Sher.*

Mozart G. Ratner argued the cause for respondent. With him on the brief were *Bernard Ries, Joseph M. Jacobs,* and *Judith A. Lonnquist. Fred Holroyd* and *Jerry Kronenberg* filed a brief for Heck's Inc., intervenor below.

MR. JUSTICE BRENNAN delivered the opinion of the Court.

The National Labor Relations Board refused to include, in a cease-and-desist order against Heck's Inc., a provision sought by respondent union, as charging party, that Heck's reimburse respondent's litigation ex-

penses and excess organizational costs incurred as a result of Heck's unlawful conduct. The Board's stated reason was that "it would not on balance effectuate the policies of the [National Labor Relations] Act to require reimbursement with respect to such costs in the circumstances here." *Heck's Inc.*, 191 N. L. R. B. 886, 889 (1971). Respondent prevailed, however, in enforcement and review proceedings in the Court of Appeals for the District of Columbia Circuit. That court enlarged the Board's order by adding provisions, paragraphs 2 (e) and (f), that Heck's "[p]ay to the Union any extraordinary organizational costs which the Union incurred by reason of Heck's policy of resisting organizational efforts and refusing to bargain, such costs to be determined at the compliance stage of these proceedings," and "[p]ay to the Board and the Union the costs and expenses incurred by them in the investigation, preparation, presentation, and conduct of these cases before the National Labor Relations Board and the courts, such costs to be determined at the compliance stage of these proceedings." 155 U. S. App. D. C. 101, 476 F. 2d 546 (1973). We granted certiorari to consider whether the enlargement of this order was a proper exercise of the authority of courts of appeals under §§ 10 (e) and (f) of the National Labor Relations Act, as amended, 61 Stat. 146, 29 U. S. C. §§ 160 (e) and (f), to "make and enter a decree . . . modifying, and enforcing as so modified" the order of the Board, 414 U. S. 1062 (1973). We reverse.

Heck's Inc. operates a chain of discount stores in the Southeast section of the country. Its resistance to union organization has resulted in some 11 proceedings before the National Labor Relations Board.[1] This case grew out of its efforts to prevent organization by respondent

[1] The many proceedings are cited in the opinion of the Court of Appeals, 155 U. S. App. D. C. 101, 102 n. 1, 476 F. 2d 546, 547 n. 1.

union of Heck's employees at its store in Clarksburg, West Virginia. The case was twice before the Board. In its first decision, the Board determined that Heck's violated § 8 (a)(1) of the Act, 29 U. S. C. § 158 (a)(1), by threatening and coercively interrogating employees during respondent's organizational campaign, and by conducting a nonsecret poll to ascertain employee support for the union. Further, the Board found that Heck's "flagrant repetition" of similar unfair labor practices at its other stores and its "extensive violations of the Act" in the Clarksburg store justified an inference that Heck's did not entertain any good-faith doubt concerning majority support for respondent union when the company refused to recognize and bargain with the union on the basis of authorization cards signed by a majority of employees. Accordingly, the Board found that Heck's violated §§ 8 (a)(5) and (1) of the Act, 29 U. S. C. §§ 158 (a)(5) and (1). Finally, because Heck's extensive violations were found to have made a free and fair election impossible, an order directing Heck's to bargain with the union was entered. The Board rejected, however, the union's argument that adequate relief required certain additional remedies, including reimbursement of litigation expenses and excess organizational costs incurred as a result of Heck's unlawful behavior.[2] *Heck's Inc.*, 172 N. L. R. B. 2231 n. 2 (1968).

The Court of Appeals for the District of Columbia Circuit enforced the Board's order, but remanded to the

[2] The Board also rejected respondent's requests for provisions directing the mailing of notices to employees; either a company-wide bargaining order or a shifting of the burden of proof in future cases to require Heck's to demonstrate its good faith in rejecting authorization cards; injunctions under § 10 (j) of the Act, 29 U. S. C. § 160 (j); increased access to employees; and a "make-whole" provision directing compensation to employees for collective-bargaining benefits lost as a result of the employer's unlawful conduct.

Board for further consideration of additional remedies including reimbursement of litigation expenses and excess organizational costs. 139 U. S. App. D. C. 383, 433 F. 2d 541 (1970).[3] On remand, the Board amended its original order to encompass certain supplemental remedies,[4] but again refused to order reimbursement of litigation expenses and excess organizational costs.[5] 191 N. L. R. B. 886. Although the Board found that Heck's unfair labor practices were "aggravated and pervasive" and that its intransigence had probably caused the union to incur greater litigation expenses and organizational costs, the Board's rationale, previously mentioned, was that the provision would not effectuate the policies of the Act. The Board reasoned that its "orders

[3] The remand was ordered in light of the Court of Appeals' intervening decision in *International Union of Elec., Radio & Mach. Workers* v. *NLRB*, 138 U. S. App. D. C. 249, 426 F. 2d 1243 (1970), known as the *Tüdee Products* case, in which the court had remanded for further Board consideration a union's submission that similar supplementary remedies were necessary where an employer's refusal to bargain was found to be "a clear and flagrant violation of the law," and its objections to a representation election were determined to be "patently frivolous." *Id.*, at 254, 426 F. 2d, at 1248.

[4] The Board directed Heck's to mail notices of the Board's amended order to the homes of all employees at each of Heck's store locations; to provide the union with reasonable access for a one-year period to bulletin boards and other places where union notices are normally posted; and to provide the union with a list of names and addresses of all employees at all locations, to be kept current for one year.

[5] The Board also refused to order, as sought by respondent, that notices of the Board's decision be read to assembled groups of employees; that a companywide bargaining order be issued; that the company be required to bargain whenever the union obtained an authorization card majority at other locations; that greater access to employees on company property be granted; and that a "make-whole" provision for reimbursement of dues and fees, and collective-bargaining benefits, lost as a result of the unlawful refusal to bargain, be ordered.

must be remedial, not punitive, and collateral losses are not considered in framing a reimbursement order." *Id.*, at 889 (footnotes omitted).[6] Moreover, a charging party's participation in the case is, the Board found, primarily for the purpose of protecting its private interests, whereas the Board has the primary responsibility for protecting the public interest. The Board therefore concluded that, although the public interest might also arguably be served "in allowing the Charging Party to recover the costs of its participation in this litigation," that consideration did not "override the general and well-established principle that litigation expenses are ordinarily not recoverable." *Ibid.* (Footnote omitted.)

Prior to review of its supplementary decision by the Court of Appeals, the Board issued its decision in *Tüdee Products, Inc.*, 194 N. L. R. B. 1234 (1972), in which the Board ordered reimbursement of litigation expenses in the context of a finding that an employer had engaged in "frivolous litigations."[7] The Board's opinion in *Tüdee* reasoned that industrial peace could be best achieved if "speedy access to uncrowded Board and court dockets [were] available" and therefore that an assessment of legal fees would serve the public interest by "discourag[ing] future frivolous litigation," *id.*, at 1236. The Board did not explain why those considerations had not

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[6] In support of this proposition, the Board relied upon *Republic Steel Corp.* v. *NLRB*, 311 U. S. 7, 11–12 (1940), and *NLRB* v. *Gullett Gin Co.*, 340 U. S. 361, 364 (1951).

[7] The Board's decision in *Tüdee* was issued after supplementary proceedings following a remand from the Court of Appeals. See n. 3, *supra*. In an opinion filed April 25, 1974, the Court of Appeals, on review of the Board's supplementary decision in *Tüdee*, enforced as modified the Board's amended order. *International Union of Elec., Radio & Mach. Workers* v. *NLRB*, 163 U. S. App. D. C. 347, 502 F. 2d 349.

led it to order similar relief in this case. The Court of Appeals therefore concluded in the present case that the Board had abandoned its policy against award of litigation expenses and excess organizational costs,[8] stating:

> "Although the Board in its Supplemental Decision in this case has nowhere characterized the litigation as frivolous, it has used the language of 'clearly aggravated and pervasive' misconduct; and in its original opinion it questioned Heck's good faith because of its 'flagrant repetition of conduct previously found unlawful' at other Heck's stores. It would appear that the Board has now recognized that employers who follow a pattern of resisting union organization, and who to that end unduly burden the processes of the Board and the courts, should be obliged, at the very least, to respond in terms of making good the legal expenses to which they have put the charging parties and the Board. We hold that the case before us is an appropriate one for according such relief." 155 U. S. App. D. C., at 106, 476 F. 2d, at 551.

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[8] The Court of Appeals made clear that the enlargement of the Board order was based squarely on the Board's change of policy perceived to have been made by *Tiidee*. The court refused to decide the question argued by respondent union that, independently of *Tiidee*, an order of reimbursement should be directed. The Court of Appeals said:

"There are, it seems to us, obvious difficulties [in relying upon the subsidiary role of the charging party as a basis for denial of litigation expenses], certainly in the case of an employer who appears to look upon litigation as a convenient means of delaying—and thereby perhaps avoiding—the fatal day of union recognition and collective bargaining. *We need not pursue those difficulties in detail*, however, for the reason that the Board itself has subsequently departed from the rationale upon which its refusal of litigation expenses in this case is based." 155 U. S. App. D. C., at 105, 476 F. 2d, at 550 (emphasis added).

The Court of Appeals also viewed *Tiidee* as the signal of a shift in the Board's attitude toward excess organizational costs. In *Tiidee*, the Board refused to order reimbursement of excess organizational costs because " 'no nexus between [the employer's] unlawful conduct' " had been proved. *Ibid.* Since, in the instant case, the Board had indicated that Heck's violations had probably caused respondent to incur excess organizational costs, a nexus was proved and accordingly the court held that respondent was entitled to an order directing reimbursement of organizational costs.

In the circumstances of this case, the Court of Appeals, in our view, improperly exercised its authority under §§ 10 (e) and (f) to modify Board orders, and the case must therefore be returned to the Board.[9] Congress has invested the Board, not the courts, with broad discretion to order a violator "to take such affirmative action . . . as will effectuate the policies of [the Act]." 29 U. S. C. § 160 (c); see, *e. g., Golden State Bottling Co.* v. *NLRB,* 414 U. S. 168, 176 (1973). This case does not present the exceptional situation in which crystal-clear Board error renders a remand an unnecessary formality. See *NLRB* v. *Express Publishing Co.,* 312 U. S. 426 (1941); *Communications Workers* v. *NLRB,* 362 U. S. 479 (1960). For it cannot be gainsaid that the finding here that Heck's asserted at least "debatable" defenses to the unfair labor practice charges, whereas objections to the representation election in *Tiidee* were "patently frivolous," might have been viewed by the Board as putting the question of remedy in a different light. We cannot

[9] We thus have no occasion at this time to address the question whether the Board's broad powers under § 10 (c), 29 U. S. C. § 160 (c), to fashion remedies include power to order reimbursement of litigation expenses and excess organizational costs.

say that the Board, in performing its appointed function of balancing conflicting interests, could not reasonably decide that where "debatable" defenses are asserted, the public and private interests in affording the employer a determination of his "debatable" defenses, unfettered by the prospect of bearing his adversary's litigation costs, outweigh the public interest in uncrowded dockets.

There are, however, facial inconsistencies between the Board's opinion in this case and the *Tiidee* decision, and the Court of Appeals therefore correctly declined to resolve those inconsistencies by substituting Board counsel's rationale for that of the Board. 155 U. S. App. D. C., at 107 n. 8, 476 F. 2d, at 552 n. 8; see *NLRB* v. *Metropolitan Life Ins. Co.*, 380 U. S. 438, 444 (1965); *Burlington Truck Lines* v. *United States*, 371 U. S. 156, 168–169 (1962). The integrity of the administrative process demands no less than that the Board, not its legal representative, exercise the discretionary judgment which Congress has entrusted to it. But since a plausible reconciliation by the Board of the seeming inconsistency was reasonably possible, it was "incompatible with the orderly function of the process of judicial review," *NLRB* v. *Metropolitan Life Ins. Co.*, *supra*, at 444, for the Court of Appeals to enlarge the Heck's order without first affording the Board an opportunity to clarify the inconsistencies.

It is a guiding principle of administrative law, long recognized by this Court, that "an administrative determination in which is imbedded a legal question open to judicial review does not impliedly foreclose the administrative agency, after its error has been corrected, from enforcing the legislative policy committed to its charge." *FCC* v. *Pottsville Broadcasting Co.*, 309 U. S. 134, 145 (1940); see *Fly* v. *Heitmeyer*, 309 U. S. 146, 148 (1940); *FTC* v. *Morton Salt Co.*, 334 U. S. 37, 55 (1948); *FPC* v. *Idaho Power Co.*, 344 U. S. 17, 20 (1952); *Konigs-*

berg v. *State Bar*, 366 U. S. 36, 43–44 (1961). Thus, when a reviewing court concludes that an agency invested with broad discretion to fashion remedies has apparently abused that discretion by omitting a remedy justified in the court's view by the factual circumstances, remand to the agency for reconsideration, and not enlargement of the agency order, is ordinarily the reviewing court's proper course. Application of that general principle in this case best respects the congressional scheme investing the Board and not the courts with broad powers to fashion remedies that will effectuate national labor policy. It also affords the Board the opportunity, through additional evidence or findings, to reframe its order better to effectuate that policy. See *FPC* v. *Idaho Power Co., supra*, at 20; *FTC* v. *Morton Salt Co., supra*, at 55. Moreover, in this case, if the Court of Appeals correctly read *Tüdee* as having signaled a change of policy in respect of reimbursement, a remand was necessary, because the Board should be given the first opportunity to determine whether the new policy should be applied retroactively.[10]

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[10] Appellate courts ordinarily apply the law in effect at the time of the appellate decision, see *Bradley* v. *School Board*, 416 U. S. 696, 711 (1974). However, a court reviewing an agency decision following an intervening change of policy by the agency should remand to permit the agency to decide in the first instance whether giving the change retrospective effect will best effectuate the policies underlying the agency's governing act.

In its present posture the case does not, of course, present the question whether Board failure, on remand, to clarify the apparent inconsistency in its decisions would warrant reversal on review. Compare *Barrett Line* v. *United States*, 326 U. S. 179 (1945), with *FCC* v. *WOKO, Inc.*, 329 U. S. 223, 227–228 (1946). See L. Jaffe, Judicial Control of Administrative Action 587–588 (1965); Shapiro, The Choice of Rulemaking or Adjudication in the Development of Administrative Policy, 78 Harv. L. Rev. 921, 947–950 (1965).

The judgment of the Court of Appeals is reversed insofar as paragraphs 2 (e) and (f) were added to the Board's order, and the case is remanded to the Court of Appeals with direction that it be remanded to the Board for further proceedings.

It is so ordered.

WILLIAM E. ARNOLD CO. *v.* CARPENTERS DISTRICT COUNCIL OF JACKSONVILLE AND VICINITY ET AL.

CERTIORARI TO THE SUPREME COURT OF FLORIDA

No. 73-466. Argued March 20, 1974—Decided May 20, 1974

When respondent unions called a jurisdictional-dispute strike against petitioner employer, petitioner brought this suit, which is within the purview of § 301 of the Labor Management Relations Act, in a Florida trial court to enjoin respondents' breach of a no-strike clause in the collective-bargaining agreement containing a binding settlement procedure. That court issued a temporary restraining order against the strike, and its action was upheld by an intermediate appellate court. The Florida Supreme Court reversed, holding that since the unions' breach was also arguably an unfair labor practice under § 8 (b) (4) (i) (D) of the National Labor Relations Act (NLRA) involving jurisdictional disputes, the jurisdiction of the National Labor Relations Board (NLRB) was exclusive. *Held:*

1. When the activity in question is arguably both an unfair labor practice prohibited by § 8 of the NLRA and a breach of a collective-bargaining agreement, the NLRB's authority "is not exclusive and does not destroy the jurisdiction of the courts in suits under § 301." *Smith* v. *Evening News Assn.*, 371 U. S. 195, 197. Pp. 15–18.

(a) The pre-emption doctrine of *San Diego Building Trades Council* v. *Garmon*, 359 U. S. 236, is "not relevant" to actions within the purview of § 301, which may be brought in either state or federal courts. P. 16.

(b) NLRB policy is to refrain from exercising jurisdiction as to conduct which is arguably both an unfair labor practice and a contract violation when, as here, the parties have voluntarily established by contract a binding settlement procedure. P. 16.

(c) When the particular contract violations also involve an arguable violation of § 8 (b) (4) (i) (D), the NLRB has recognized added policy justifications for deferring to the contractual dispute settlement mechanism, as indicated by § 10 (k) of the NLRA, which by its special procedure for NLRB resolution of charges

involving jurisdictional disputes "not only tolerates but actually encourages" settlements of such disputes. Pp. 17–18.

2. State court jurisdiction over collective-bargaining disputes does not turn upon the particular type of relief sought, and therefore is not limited to claims for damages, rather than injunctive relief. Pp. 18–20.

279 So. 2d 300, reversed and remanded.

BRENNAN, J., delivered the opinion for a unanimous Court.

John Paul Jones argued the cause for petitioner. With him on the brief were *Daniel R. Coffman, Jr.*, and *Allan P. Clark*.

Joseph S. Farley, Jr., argued the cause and filed a brief for respondents.*

MR. JUSTICE BRENNAN delivered the opinion of the Court.

The Florida Supreme Court held that the Florida District Court of Appeal erred in refusing to issue a writ of prohibition to restrain the Circuit Court for Duval County from exercising its jurisdiction over a suit within the purview of § 301 of the Labor Management Relations Act (LMRA).[1] The suit sought to enjoin respondent unions' breach of a no-strike clause contained in a

*Briefs of *amici curiae* urging reversal were filed by *Solicitor General Bork, Peter G. Nash, John S. Irving, Patrick Hardin*, and *Norton J. Come* for the United States, and by *Gerard C. Smetana, Jerry Kronenberg*, and *Milton Smith* for the Chamber of Commerce of the United States.

[1] "Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this chapter, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties." 61 Stat. 156, 29 U. S. C. § 185 (a).

collective-bargaining agreement, which breach arguably is also an unfair labor practice under the Act. The State Supreme Court stated: "It is unquestionable that state courts do have jurisdiction to enforce a collective-bargaining agreement and to enjoin a strike in violation of a 'no-strike' clause contained therein, but not when the strike is also arguably an unfair labor practice prohibited by federal law." 279 So. 2d 300, 302 (1973). We granted certiorari to decide whether the holding of the Florida Supreme Court was consistent with decisions of this Court, including *Teamsters Local* v. *Lucas Flour Co.*, 369 U. S. 95 (1962), and *Smith* v. *Evening News Assn.*, 371 U. S. 195 (1962). 414 U. S. 1063 (1973). We reverse.

Article VI of a collective-bargaining agreement between petitioner, William E. Arnold Co., and respondents, Carpenters District Council of Jacksonville and Vicinity and its affiliate, Local 627 (Carpenters), provides:

> "There shall be no work stoppage, slowdown, work cessation or strike because of a Jurisdictional Dispute. A mutually agreeable settlement, or joint decision of the International Unions involved, or decision or interpretation of the National Joint Board for the Settlement of Jurisdictional Disputes (or Hearing Panel) shall be binding and all parties agree to accept such decision or interpretation."

In 1971, during the construction of the Jacksonville General Hospital, one of Arnold's subcontractors assigned work claimed by the Carpenters to the Wood, Wire and Metal Lathers International Union, AFL–CIO, Local 59. The Carpenters struck Arnold to force reassignment of the work to their members. Arnold thereupon brought this suit in the Circuit Court of Duval County to enjoin the Carpenters from violating the provisions of

Art. VI and obtained a temporary restraining order prohibiting the strike. The Carpenters then sought a writ of prohibition from a Florida District Court of Appeal, contending that the Circuit Court lacked jurisdiction to order injunctive relief because the alleged breach of the no-strike clause was also arguably an unfair labor practice under § 8 (b)(4)(i)(D) of the National Labor Relations Act (NLRA), 29 U. S. C. § 158 (b)(4)(i)(D),[2] and therefore fell within the exclusive jurisdiction of the National Labor Relations Board (Board). The District Court of Appeal denied the writ of prohibition and, as previously mentioned, the Supreme Court of Florida reversed.

When an activity is either arguably protected by § 7 or arguably prohibited by § 8 of the NLRA, the preemption doctrine developed in *San Diego Building Trades Council* v. *Garmon*, 359 U. S. 236 (1959), and its progeny, teaches that ordinarily "the States as well as the federal courts must defer to the exclusive competence

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[2] Section 8 (b)(4) makes it an unfair labor practice for a labor organization or its agents:

"(i) to engage in, or to induce or encourage any individual employed by any person engaged in commerce or in an industry affecting commerce to engage in, a strike or a refusal in the course of his employment to use, manufacture, process, transport, or otherwise, handle or work on any goods, articles, materials, or commodities or to perform any services; or (ii) to threaten, coerce, or restrain any person engaged in commerce or in an industry affecting commerce, where in either case an object thereof is—

. . . . . .

"(D) forcing or requiring any employer to assign particular work to employees in a particular labor organization or in a particular trade, craft, or class rather than to employees in another labor organization or in another trade, craft, or class, unless such employer is failing to conform to an order or certification of the Board determining the bargaining representative for employees performing such work . . . ."

of the National Labor Relations Board if the danger of state interference with national policy is to be averted." *Id.*, at 245. When, however, the activity in question also constitutes a breach of a collective-bargaining agreement, the Board's authority "is not exclusive and does not destroy the jurisdiction of the courts in suits under § 301." *Smith* v. *Evening News Assn.*, 371 U. S., at 197. This exception was explicitly reaffirmed in *Motor Coach Employees* v. *Lockridge*, 403 U. S. 274, 297–298 (1971). It was fashioned because the history of § 301 reveals that "Congress deliberately chose to leave the enforcement of collective agreements 'to the usual processes of the law,'" *Dowd Box Co.* v. *Courtney*, 368 U. S. 502, 513 (1962). Thus, we have said that the *Garmon* doctrine is "not relevant" to actions within the purview of § 301, *Teamsters Local* v. *Lucas Flour Co.*, 369 U. S., at 101 n. 9, which may be brought in either state or federal courts, *Dowd Box Co.* v. *Courtney, supra*, at 506.

Indeed, Board policy is to refrain from exercising jurisdiction in respect of disputed conduct arguably both an unfair labor practice and a contract violation when, as in this case, the parties have voluntarily established by contract a binding settlement procedure. See, *e. g.*, *The Associated Press*, 199 N. L. R. B. 1110 (1972); *Eastman Broadcasting Co.*, 199 N. L. R. B. 434 (1972); *Laborers Local 423*, 199 N. L. R. B. 450 (1972); *Collyer Insulated Wire*, 192 N. L. R. B. 837 (1971). The Board said in *Collyer*, "an industrial relations dispute may involve conduct which, at least arguably, may contravene both the collective agreement and our statute. When the parties have contractually committed themselves to mutually agreeable procedures for resolving their disputes during the period of the contract, we are of the view that those procedures should be afforded full opportunity to

function. . . . We believe it to be consistent with the fundamental objectives of Federal law to require the parties . . . to honor their contractual obligations rather than, by casting [their] dispute in statutory terms, to ignore their agreed-upon procedures." *Id.*, at 842–843. The Board's position harmonizes with Congress' articulated concern that, "[f]inal adjustment by a method agreed upon by the parties is . . . the desirable method for settlement of grievance disputes arising over the application or interpretation of an existing collective-bargaining agreement. . . ." § 203 (d) of the LMRA, 29 U. S. C. § 173 (d).

Furthermore, when the particular contract violation also involves an arguable violation of § 8 (b)(4)(i)(D) of the NLRA concerning jurisdictional disputes, as in this case, the Board has recognized added policy justifications for deferring to the contractual dispute settlement mechanism agreed upon by the parties. Section 10 (k) of the NLRA, 29 U. S. C. § 160 (k), establishes a special procedure for the Board's resolution of charges involving jurisdictional disputes:

> "Whenever it is charged that any person has engaged in an unfair labor practice within the meaning of paragraph (4)(D) of section 158 (b) of this title, the Board is empowered and directed to hear and determine the dispute out of which such unfair labor practice shall have arisen, *unless, within ten days after notice that such charge has been filed, the parties to such dispute submit to the Board satisfactory evidence that they have adjusted, or agreed upon methods for the voluntary adjustment of, the dispute. Upon compliance by the parties to the dispute with the decision of the Board or upon such voluntary adjustment of the dispute, such charge shall be dismissed.*" (Emphasis added.)

Thus, § 10 (k) "not only tolerates but actively encourages voluntary settlements of work assignment controversies between unions . . . ." *Carey* v. *Westinghouse Electric Corp.*, 375 U. S. 261, 266 (1964). Recognizing Congress' preference for voluntary settlement of jurisdictional disputes, the Board has declined jurisdiction in § 10 (k) cases, commenting that, "[i]f we retained jurisdiction . . . , the statutory purpose to encourage the voluntary settlement of jurisdictional disputes would be frustrated in that a party receiving an adverse decision from the agreed-upon tribunal for settling its jurisdictional dispute would be encouraged to ignore such decision, lapse into noncompliance, and then come before this Board for a more favorable resolution of the dispute." *Laborers Local 423*, 199 N. L. R. B., at 451.

The Board's practice and policy of declining to exercise its concurrent jurisdiction over arguably unfair labor practices which also violate provisions of collective-bargaining agreements for voluntary adjustment of disputes highlight the congressional purpose that § 301 suits in state and federal courts should be the primary means for "promoting collective bargaining that [ends] with agreements not to strike." *Textile Workers* v. *Lincoln Mills*, 353 U. S. 448, 453 (1957). The assurance of swift and effective judicial relief provides incentive to eschew economic weapons in favor of binding grievance procedures and no-strike clauses.

The Carpenters contend, however, that state court jurisdiction over collective-bargaining disputes should be limited to claims for damages, rather than injunctive relief. See Brief for Respondents 7–9. We disagree. To be sure, *Lucas, Smith,* and *Lockridge,* all *supra,* involved only damages claims, but nothing in the opinions in those cases remotely suggests that state court jurisdiction should turn upon the particular type of relief sought.

Indeed, *Avco Corp.* v. *Aero Lodge 735,* 390 U. S. 557, 561 (1968), disposes of the argument. We there said: "The nature of the relief available after jurisdiction attaches is, of course, different from the question whether there is jurisdiction to adjudicate the controversy. . . . Any error in granting or designing relief 'does not go to the jurisdiction of the court.' *Swift & Co.* v. *United States,* 276 U. S. 311, 331." Moreover, the policy reasons against extension of the *Garmon* doctrine to suits within the scope of § 301 are particularly compelling when the relief sought is specific performance of a no-strike obligation, rather than damages. What we said in *Boys Markets* v. *Clerks Union,* 398 U. S. 235, 248 (1970), is pertinent here:

> "[A] no-strike obligation, express or implied, is the *quid pro quo* for an undertaking by the employer to submit grievance disputes to the process of arbitration. See *Textile Workers Union* v. *Lincoln Mills, supra,* at 455. Any incentive for employers to enter into such an arrangement is necessarily dissipated if the principal and most expeditious method by which the no-strike obligation can be enforced is eliminated. While it is of course true, as respondent contends, that other avenues of redress, such as an action for damages, would remain open to an aggrieved employer, an award of damages after a dispute has been settled is no substitute for an immediate halt to an illegal strike. Furthermore, an action for damages prosecuted during or after a labor dispute would only tend to aggravate industrial strife and delay an early resolution of the difficulties between employer and union." (Footnotes omitted.)

See also *Gateway Coal Co.* v. *United Mine Workers,* 414 U. S. 368, 382 (1973).

Therefore, we reject the argument of Carpenters that the availability of effective equitable relief should be limited to the federal courts. We have previously expressed our agreement with Chief Justice Traynor of the California Supreme Court that "whether or not Congress could deprive state courts of the power to give such [injunctive] remedies when enforcing collective-bargaining agreements, it has not attempted to do so either in the Norris-La Guardia Act or section 301," *McCarroll* v. *Los Angeles County Dist. Council of Carpenters,* 49 Cal. 2d 45, 63, 315 P. 2d 322, 332 (1957). See *Boys Markets* v. *Clerks Union, supra,* at 247. Rather, the jurisdiction given federal courts under § 301 was "not to displace, but to supplement, the thoroughly considered jurisdiction of the courts of the various States over contracts made by labor organizations," *Dowd Box Co.* v. *Courtney,* 368 U. S., at 511.

We do not, of course, pass upon the propriety of the injunctive relief sought in the present case. That is a question to be resolved on remand. The judgment of the Supreme Court of Florida is reversed and the case remanded for further proceedings not inconsistent with this opinion.

It is so ordered.

Syllabus

BLACKLEDGE, WARDEN, ET AL. *v.* PERRY

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

No. 72-1660. Argued February 19, 1974—Decided May 20, 1974

Respondent, a North Carolina prison inmate, had an altercation with another prisoner, and was charged with the misdemeanor of assault with a deadly weapon, of which he was convicted in the State District Court. While respondent's subsequent appeal was pending in the Superior Court, where he had the right to a trial *de novo*, the prosecutor obtained an indictment covering the same conduct for the felony offense of assault with a deadly weapon with intent to kill and inflict serious bodily injury, to which respondent pleaded guilty. Thereafter, respondent applied for a writ of habeas corpus in Federal District Court, claiming, *inter alia*, that the felony indictment deprived him of due process. The District Court granted the writ, and the Court of Appeals affirmed. *Held:*

1. The indictment on the felony charge contravened the Due Process Clause of the Fourteenth Amendment, since a person convicted of a misdemeanor in North Carolina is entitled to pursue his right under state law to a trial *de novo* without apprehension that the State will retaliate by substituting a more serious charge for the original one and thus subject him to a significantly increased potential period of incarceration. Cf. *North Carolina* v. *Pearce*, 395 U. S. 711. Pp. 24–29.

2. Since North Carolina, having chosen originally to proceed against respondent on the misdemeanor charge in the State District Court, was precluded by the Due Process Clause from even prosecuting respondent for the more serious charge in the Superior Court, respondent's guilty plea to the felony charge did not bar him from raising his constitutional claim in the federal habeas corpus proceeding. *Tollett* v. *Henderson*, 411 U. S. 258, distinguished. Pp. 29–31.

Affirmed.

STEWART, J., delivered the opinion of the Court, in which BURGER, C. J., and DOUGLAS, BRENNAN, WHITE, MARSHALL, and BLACKMUN, JJ., joined. REHNQUIST, J., filed a dissenting opinion, in Part II of which POWELL, J., joined, *post*, p. 32.

Richard N. League, Assistant Attorney General of North Carolina, argued the cause for petitioners. With him on the brief was *Robert Morgan*, Attorney General.

James E. Keenan, by appointment of the Court, 414 U. S. 1020, argued the cause and filed a brief for respondent.

MR. JUSTICE STEWART delivered the opinion of the Court.

While serving a term of imprisonment in a North Carolina penitentiary, the respondent Perry became involved in an altercation with another inmate. A warrant issued, charging Perry with the misdemeanor of assault with a deadly weapon, N. C. Gen. Stat. § 14–33 (b)(1) (1969). Under North Carolina law, the District Court Division of the General Court of Justice has exclusive jurisdiction for the trial of misdemeanors. N. C. Gen. Stat. § 7A–272. Following a trial without a jury in the District Court of Northampton County, Perry was convicted of this misdemeanor and given a six-month sentence, to be served after completion of the prison term he was then serving.

Perry then filed a notice of appeal to the Northampton County Superior Court. Under North Carolina law, a person convicted in the District Court has a right to a trial *de novo* in the Superior Court. N. C. Gen. Stat. §§ 7A–290, 15–177.1. The right to trial *de novo* is absolute, there being no need for the appellant to allege error in the original proceeding. When an appeal is taken, the statutory scheme provides that the slate is wiped clean; the prior conviction is annulled, and the prosecution and the defense begin anew in the Superior Court.[1]

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[1] See generally *State* v. *Spencer*, 276 N. C. 535, 173 S. E. 2d 765; *State* v. *Sparrow*, 276 N. C. 499, 173 S. E. 2d 897.

After the filing of the notice of appeal, but prior to the respondent's appearance for trial *de novo* in the Superior Court, the prosecutor obtained an indictment from a grand jury, charging Perry with the felony of assault with a deadly weapon with intent to kill and inflict serious bodily injury, N. C. Gen. Stat. § 14–32 (a) (1969). The indictment covered the same conduct for which Perry had been tried and convicted in the District Court. Perry entered a plea of guilty to the indictment in the Superior Court, and was sentenced to a term of five to seven years in the penitentiary, to be served concurrently with the identical prison sentence he was then serving.[2]

A number of months later, the respondent filed an application for a writ of habeas corpus in the United States District Court for the Eastern District of North Carolina. He claimed that the indictment on the felony charge in the Superior Court constituted double jeopardy and also deprived him of due process of law. In an unreported opinion, the District Court dismissed the petition for failure to exhaust available state remedies. The United States Court of Appeals for the Fourth Circuit

[2] The respondent's guilty plea was apparently premised on the expectation that any sentence he received in the Superior Court would be served concurrently with the sentence he was then serving, as contrasted with the consecutive sentence imposed in the District Court. That expectation was fulfilled, but it turned out that the guilty plea resulted in increasing the respondent's potential term of incarceration. Under applicable North Carolina law, the five- to seven-year assault sentence did not commence until the date of the guilty plea, October 29, 1969. By that time, Perry had already served some 17 months of the sentence he was serving at the time of the alleged assault. Thus, the effect of the five- to seven-year concurrent sentence on the assault charge was to increase his potential period of confinement by these 17 months, as opposed to the six-month increase envisaged by the District Court's consecutive sentence.

reversed, holding that resort to the state courts would be futile, because the Supreme Court of North Carolina had consistently rejected the constitutional claims presented by Perry in his petition. 453 F. 2d 856.[3] The case was remanded to the District Court for further proceedings.

On remand, the District Court granted the writ. It held that the bringing of the felony charge after the filing of the appeal violated Perry's rights under the Double Jeopardy Clause of the Fifth Amendment, made applicable to the States through the Fourteenth Amendment, *Benton* v. *Maryland,* 395 U. S. 784. The District Court further held that the respondent had not, by his guilty plea in the Superior Court, waived his right to raise his constitutional claims in the federal habeas corpus proceeding. The Court of Appeals affirmed the judgment in a brief *per curiam* opinion. We granted certiorari, 414 U. S. 908, to consider the seemingly important issues presented by this case.

I

As in the District Court, Perry directs two independent constitutional attacks upon the conduct of the

[3] The Court of Appeals further instructed the District Court to await the ruling of this Court in *Rice* v. *North Carolina,* 434 F. 2d 297 (CA4), cert. granted, 401 U. S. 1008. *Rice* involved a challenge to the constitutionality of an enhanced penalty received after a criminal defendant had sought a trial *de novo* under North Carolina's two-tiered misdemeanor adjudication system. This Court did not reach the merits of this issue in *Rice,* instead vacating and remanding to the Court of Appeals for consideration as to whether the case had become moot. 404 U. S. 244.

Subsequently, in *Colten* v. *Kentucky,* 407 U. S. 104, we dealt with the merits of this issue, and held that the imposition of an increased sentence on trial *de novo* did not violate either the Due Process or the Double Jeopardy Clause. The District Court in the present case had the benefit of the *Colten* decision before issuing its opinion granting habeas corpus relief.

State in haling him into court on the felony charge after he took an appeal from the misdemeanor conviction. First, he contends that the felony indictment in the Superior Court placed him in double jeopardy, since he had already been convicted on the lesser included misdemeanor charge in the District Court. Second, he urges that the indictment on the felony charge constituted a penalty for his exercising his statutory right to appeal, and thus contravened the Due Process Clause of the Fourteenth Amendment.[4] We find it necessary to reach only the latter claim.

Perry's due process arguments are derived substantially from *North Carolina* v. *Pearce*, 395 U. S. 711, and its progeny. In *Pearce*, the Court considered the constitutional problems presented when, following a successful appeal and reconviction, a criminal defendant was subjected to a greater punishment than that imposed at the first trial. While we concluded that such a harsher sentence was not absolutely precluded by either the Double Jeopardy or Due Process Clause, we emphasized that "imposition of a penalty upon the defendant for having successfully pursued a statutory right of appeal or collateral remedy would be . . . a violation of due process of law." *Id.*, at 724. Because "vindictiveness against a defendant for having successfully attacked his first conviction must play no part in the sentence he receives

[4] This Court has never held that the States are constitutionally required to establish avenues of appellate review of criminal convictions. Nonetheless, "it is now fundamental that, once established, these avenues must be kept free of unreasoned distinctions that can only impede open and equal access to the courts." *Rinaldi* v. *Yeager*, 384 U. S. 305, 310. See also *Griffin* v. *Illinois*, 351 U. S. 12; *Douglas* v. *California*, 372 U. S. 353; *Lane* v. *Brown*, 372 U. S. 477; *Draper* v. *Washington*, 372 U. S. 487; *North Carolina* v. *Pearce*, 395 U. S. 711, 724–725; *Chaffin* v. *Stynchcombe*, 412 U. S. 17, 24 n. 11.

after a new trial," *id.*, at 725, we held that an increased sentence could not be imposed upon retrial unless the sentencing judge placed certain specified findings on the record.

In *Colten* v. *Kentucky*, 407 U. S. 104, the Court was called upon to decide the applicability of the *Pearce* holding to Kentucky's two-tiered system of criminal adjudication. Kentucky, like North Carolina, allows a misdemeanor defendant convicted in an inferior trial court to seek a trial *de novo* in a court of general jurisdiction.[5] The appellant in *Colten* claimed that the Constitution prevented the court of general jurisdiction, after trial *de novo*, from imposing a sentence in excess of that imposed in the court of original trial. This Court rejected the *Pearce* analogy. Emphasizing that *Pearce* was directed at insuring the absence of "vindictiveness" against a criminal defendant who attacked his initial conviction on appeal, the Court found such dangers greatly minimized on the facts presented in *Colten*. In contrast to *Pearce*, the court that imposed the increased sentence after retrial in *Colten* was not the one whose original judgment had prompted an appellate reversal; thus, there was little possibility that an increased sentence on trial *de novo* could have been motivated by personal vindictiveness on the part of the sentencing judge. Hence, the Court thought the prophylactic rule of *Pearce* unnecessary in the *de novo* trial and sentencing context of *Colten*.

The *Pearce* decision was again interpreted by this Court last Term in *Chaffin* v. *Stynchcombe*, 412 U. S. 17, in the setting of Georgia's system under which sentencing responsibility is entrusted to the jury. Upon retrial following the reversal of his original conviction, the

[5] For a more exhaustive list of States employing similar two-tiered procedures, see *Colten*, *supra*, at 112 n. 4.

defendant in *Chaffin* was reconvicted and sentenced to a greater term than had been imposed by the initial jury. Concentrating again on the issue of vindictiveness, the Court found no violation of the *Pearce* rule. It was noted that the second jury was completely unaware of the original sentence, and thus could hardly have sought to "punish" Chaffin for his successful appeal. Moreover, the jury, unlike a judge who had been reversed on appeal, could hardly have a stake in the prior conviction or any motivation to discourage criminal defendants from seeking appellate review. Hence, it was concluded that the danger of vindictiveness under the circumstances of the case was *"de minimis," id.*, at 26, and did not require adoption of the constitutional rule set out in *Pearce.*

The lesson that emerges from *Pearce, Colten,* and *Chaffin* is that the Due Process Clause is not offended by all possibilities of increased punishment upon retrial after appeal, but only by those that pose a realistic likelihood of "vindictiveness." Unlike the circumstances presented by those cases, however, in the situation here the central figure is not the judge or the jury, but the prosecutor. The question is whether the opportunities for vindictiveness in this situation are such as to impel the conclusion that due process of law requires a rule analogous to that of the *Pearce* case. We conclude that the answer must be in the affirmative.

A prosecutor clearly has a considerable stake in discouraging convicted misdemeanants from appealing and thus obtaining a trial *de novo* in the Superior Court, since such an appeal will clearly require increased expenditures of prosecutorial resources before the defendant's conviction becomes final, and may even result in a formerly convicted defendant's going free. And, if the prosecutor has the means readily at hand to discourage such

appeals—by "upping the ante" through a felony indictment whenever a convicted misdemeanant pursues his statutory appellate remedy—the State can insure that only the most hardy defendants will brave the hazards of a *de novo* trial.

There is, of course, no evidence that the prosecutor in this case acted in bad faith or maliciously in seeking a felony indictment against Perry. The rationale of our judgment in the *Pearce* case, however, was not grounded upon the proposition that actual retaliatory motivation must inevitably exist. Rather, we emphasized that "since the fear of such vindictiveness may unconstitutionally deter a defendant's exercise of the right to appeal or collaterally attack his first conviction, due process also requires that a defendant be freed of apprehension of such a retaliatory motivation on the part of the sentencing judge." 395 U. S., at 725. We think it clear that the same considerations apply here. A person convicted of an offense is entitled to pursue his statutory right to a trial *de novo*, without apprehension that the State will retaliate by substituting a more serious charge for the original one, thus subjecting him to a significantly increased potential period of incarceration.[6] Cf. *United States* v. *Jackson*, 390 U. S. 570.

Due process of law requires that such a potential for vindictiveness must not enter into North Carolina's two-tiered appellate process. We hold, therefore, that it was not constitutionally permissible for the State to respond

[6] Moreover, even putting to one side the potentiality of increased incarceration, conviction of a "felony" often entails more serious collateral consequences than those incurred through a misdemeanor conviction. See generally Special Project, The Collateral Consequences of a Criminal Conviction, 23 Vand. L. Rev. 929, 955–960; Note, Civil Disabilities of Felons, 53 Va. L. Rev. 403, 406–408. Cf. *O'Brien* v. *Skinner*, 414 U. S. 524 (involving New York law under which convicted misdemeanants retain the right to vote).

to Perry's invocation of his statutory right to appeal by bringing a more serious charge against him prior to the trial *de novo*.[7]

II

The remaining question is whether, because of his guilty plea to the felony charge in the Superior Court, Perry is precluded from raising his constitutional claims in this federal habeas corpus proceeding. In contending that such is the case, petitioners rely chiefly on this Court's decision last Term in *Tollett* v. *Henderson*, 411 U. S. 258.

The precise issue presented in *Tollett* was "whether a state prisoner, pleading guilty with the advice of counsel, may later obtain release through federal habeas corpus by proving only that the indictment to which he pleaded was returned by an unconstitutionally selected grand jury." *Id.*, at 260. The Court answered that question in the negative. Relying primarily on the guilty-plea trilogy of *Brady* v. *United States*, 397 U. S. 742, *McMann* v. *Richardson*, 397 U. S. 759, and *Parker* v. *North Carolina*, 397 U. S. 790, the Court characterized the guilty plea as "a break in the chain of events which has preceded it in the criminal process." 411 U. S., at 267. Accordingly, the Court held that when a criminal defendant enters a guilty plea, "he may not thereafter raise independent claims relating to the deprivation of con-

[7] This would clearly be a different case if the State had shown that it was impossible to proceed on the more serious charge at the outset, as in *Diaz* v. *United States*, 223 U. S. 442. In that case the defendant was originally tried and convicted for assault and battery. Subsequent to the original trial, the assault victim died, and the defendant was then tried and convicted for homicide. Obviously, it would not have been possible for the authorities in *Diaz* to have originally proceeded against the defendant on the more serious charge, since the crime of homicide was not complete until after the victim's death.

stitutional rights that occurred prior to the entry of the guilty plea." *Ibid.* Rather, a person complaining of such "antecedent constitutional violations," *id.*, at 266, is limited in a federal habeas corpus proceeding to attacks on the voluntary and intelligent nature of the guilty plea, through proof that the advice received from counsel was not "within the range of competence demanded of attorneys in criminal cases." See *McMann, supra,* at 771.

While petitioners' reliance upon the *Tollett* opinion is understandable, there is a fundamental distinction between this case and that one. Although the underlying claims presented in *Tollett* and the *Brady* trilogy were of constitutional dimensions, none went to the very power of the State to bring the defendant into court to answer the charge brought against him. The defendants in *McMann* v. *Richardson,* for example, could surely have been brought to trial without the use of the allegedly coerced confessions, and even a tainted indictment of the sort alleged in *Tollett* could have been "cured" through a new indictment by a properly selected grand jury. In the case at hand, by contrast, the nature of the underlying constitutional infirmity is markedly different. Having chosen originally to proceed on the misdemeanor charge in the District Court, the State of North Carolina was, under the facts of this case, simply precluded by the Due Process Clause from calling upon the respondent to answer to the more serious charge in the Superior Court. Unlike the defendant in *Tollett,* Perry is not complaining of "antecedent constitutional violations" or of a "deprivation of constitutional rights that occurred prior to the entry of the guilty plea." 411 U. S., at 266, 267. Rather, the right that he asserts and that we today accept is the right not to be haled into court at all upon the felony charge. The very initiation of the proceedings against

him in the Superior Court thus operated to deny him due process of law.

Last Term in *Robinson* v. *Neil*, 409 U. S. 505, in explaining why the Double Jeopardy Clause is distinctive, the Court noted that "its practical result is to prevent a trial from taking place at all, rather than to prescribe procedural rules that govern the conduct of a trial." *Id.*, at 509. While our judgment today is not based upon the Double Jeopardy Clause, we think that the quoted language aptly describes the due process right upon which our judgment *is* based. The "practical result" dictated by the Due Process Clause in this case is that North Carolina simply could not permissibly require Perry to answer to the felony charge. That being so, it follows that his guilty plea did not foreclose him from attacking his conviction in the Superior Court proceedings through a federal writ of habeas corpus.[8]

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[8] Contrary to the dissenting opinion, our decision today does not "assure that no penalty whatever will be imposed" on respondent. *Post*, at 39. While the Due Process Clause of the Fourteenth Amendment bars trial of Perry on the felony assault charges in the Superior Court, North Carolina is wholly free to conduct a trial *de novo* in the Superior Court on the original misdemeanor assault charge. Indeed, this is precisely the course that Perry has invited, by filing an appeal from the original judgment of the District Court.

The dissenting opinion also seems to misconceive the nature of the due process right at stake here. If this were a case involving simply an increased sentence violative of the *Pearce* rule, a remand for resentencing would be in order. Our holding today, however, is not that Perry was denied due process by the length of the sentence imposed by the Superior Court, but rather by the very institution of the felony indictment against him. While we reach this conclusion in partial reliance on the analogy of *Pearce* and its progeny, the due process violation here is not the same as was involved in those cases, and cannot be remedied solely through a resentencing procedure in the Superior Court. Cf. n. 6, *supra*.

Accordingly, the judgment of the Court of Appeals for the Fourth Circuit is affirmed. *It is so ordered.*

MR. JUSTICE REHNQUIST, dissenting.

I would find it more difficult than the Court apparently does in Part I of its opinion to conclude that the very bringing of more serious charges against respondent following his request for a trial *de novo* violated due process as defined in *North Carolina* v. *Pearce*, 395 U. S. 711 (1969). Still more importantly, I believe the Court's conclusion that respondent may assert the Court's newfound *Pearce* claim in this federal habeas action, despite his plea of guilty to the charges brought after his invocation of his statutory right to a trial *de novo*, marks an unwarranted departure from the principles we have recently enunciated in *Tollett* v. *Henderson*, 411 U. S. 258 (1973), and the *Brady* trilogy, *Brady* v. *United States*, 397 U. S. 742 (1970); *McMann* v. *Richardson*, 397 U. S. 759 (1970); and *Parker* v. *North Carolina*, 397 U. S. 790 (1970).

I

As the Court notes, in addition to his claim based on *Pearce*, respondent contends that his felony indictment in the Superior Court violated his rights under the Double Jeopardy Clause of the Fifth Amendment, made applicable to the States through the Fourteenth Amendment, *Benton* v. *Maryland*, 395 U. S. 784 (1969). Presumably because we have earlier held that "the jeopardy incident to" a trial does "not extend to an offense beyond [the trial court's] jurisdiction," *Diaz* v. *United States*, 223 U. S. 442, 449 (1912), the Court rests its decision instead on the Fourteenth Amendment due process doctrine of *Pearce*. In so doing, I think the Court too readily equates the role of the prosecutor, who is a natural adversary of the defendant and who, we observed in

Chaffin v. *Stynchcombe*, 412 U. S. 17, 27 n. 13 (1973), "often request[s] more than [he] can reasonably expect to get," with that of the sentencing judge in *Pearce*. I also think the Court passes too lightly over the reasoning of *Colten* v. *Kentucky*, 407 U. S. 104 (1972), in which we held that imposition of the prophylactic rule of *Pearce* was not necessary in Kentucky's two-tier system for *de novo* appeals from justice court convictions, even though the judge at retrial might impose a more severe sentence than had been imposed by the justice court after the original trial.

The concurring opinion in *Pearce*, 395 U. S. 711, 726, took the position that the imposition of a penalty after retrial which exceeded the penalty imposed after the first trial violated the guarantee against double jeopardy. But the opinion of the Court, relying on cases such as *United States* v. *Ball*, 163 U. S. 662 (1896), and *Stroud* v. *United States*, 251 U. S. 15 (1919), specifically rejected such an approach to the case. The Court went on to hold "that neither the double jeopardy provision nor the Equal Protection Clause imposes an absolute bar to a more severe sentence upon reconviction." 395 U. S., at 723. The Court concluded by holding that due process "requires that vindictiveness against a defendant for having successfully attacked his first conviction must play no part in the sentence he receives after a new trial. And since the fear of such vindictiveness may unconstitutionally deter a defendant's exercise of the right to appeal or collaterally attack his first conviction, due process also requires that a defendant be freed of apprehension of such a retaliatory motivation on the part of the sentencing judge." *Id.*, at 725. To make certain that those requirements of due process were met, the Court laid down the rule that "whenever a judge imposes a more severe sentence upon a defendant after

a new trial, the reasons for his doing so must affirmatively appear." *Id.*, at 726. Thus the avowed purpose of the remedy fashioned in *Pearce* was to prevent judicial vindictiveness from resulting in longer sentences after a retrial following successful appeal.

Since in theory if not in practice the second sentence in the *Pearce* situation might be expected to be the same as the first unless influenced by vindictiveness or by intervening conduct of the defendant, in theory at least the remedy mandated there reached no further than the identified wrong. The same cannot be said here. For while indictment on more serious charges after a successful appeal would present a problem closely analogous to that in *Pearce* in this respect, the bringing of more serious charges after a defendant's exercise of his absolute right to a trial *de novo* in North Carolina's two-tier system does not. The prosecutor here elected to proceed initially in the State District Court where felony charges could not be prosecuted, for reasons which may well have been unrelated to whether he believed respondent was guilty of and could be convicted of the felony with which he was later charged. Both prosecutor and defendant stand to benefit from an initial prosecution in the District Court, the prosecutor at least from its less burdensome procedures and the defendant from the opportunity for an initial acquittal and the limited penalties. With the countervailing reasons for proceeding only on the misdemeanor charge in the District Court no longer applicable once the defendant has invoked his statutory right to a trial *de novo*, a prosecutor need not be vindictive to seek to indict and convict a defendant of the more serious of the two crimes of which he believes him guilty. Thus even if one accepts the Court's equation of prosecutorial vindictiveness with judicial vindictiveness, here, unlike *Pearce*, the Court's remedy reaches far beyond the wrong it identifies.

Indeed, it is not a little puzzling that the Court's remedy is the same that would follow upon a conclusion that the bringing of the new charges violated respondent's rights under the Double Jeopardy Clause. And the Court's conclusion that "[t]he very initiation of the proceedings against [respondent] in the Superior Court thus operated to deny him due process of law" surely sounds in the language of double jeopardy, however it may be dressed in due process garb.

II

If the Court is correct in stating the consequences of upholding respondent's constitutional claim here, and indeed the State lacked the very power to bring him to trial, I believe this case is governed by cases culminating in *Tollett* v. *Henderson,* 411 U. S. 258 (1973). In that case the State no doubt lacked "power" to bring Henderson to trial without a valid grand jury indictment; yet that constitutional disability was held by us to be merged in the guilty plea. I do not see why a constitutional claim the consequences of which make it the identical twin of double jeopardy may not, like double jeopardy, be waived by the person for whose benefit it is accorded. *Kepner* v. *United States,* 195 U. S. 100, 131 (1904); *Harris* v. *United States,* 237 F. 2d 274, 277 (CA8 1956); *Kistner* v. *United States,* 332 F. 2d 978, 980 (CA8 1964).

In *Tollett* v. *Henderson, supra,* we held that "just as the guilty pleas in the *Brady* trilogy were found to foreclose direct inquiry into the merits of claimed antecedent constitutional violations there, . . . respondent's guilty plea here alike forecloses independent inquiry into the claim of discrimination in the selection of the grand jury." 411 U. S., at 266. Surely the due process violation found by the Court today is no less "antecedent" than the constitutional violations claimed to make the

grand jury indictment invalid in *Tollett* v. *Henderson,* the confession inadmissible in *McMann,* or the exercise of the right to a jury trial impermissibly burdened in *Brady* and *Parker.* As the Court notes, we reaffirmed in *Tollett* v. *Henderson* the principle of the *Brady* trilogy that "a guilty plea represents a break in the chain of events which has preceded it in the criminal process." 411 U. S., at 267. We went on to say there:

> "When a criminal defendant has solemnly admitted in open court that he is in fact guilty of the offense with which he is charged, he may not thereafter raise independent claims relating to the deprivation of constitutional rights that occurred prior to the entry of the guilty plea. He may only attack the voluntary and intelligent character of the guilty plea by showing that the advice he received from counsel was not within the standards set forth in *McMann.*" *Ibid.*

The assertion by the Court that this reasoning is somehow inapplicable here because the claim goes "to the very power of the State to bring the defendant into court to answer the charge brought against him" is little other than a conclusion. Any difference between the issue resolved the other way in *Tollett* v. *Henderson* and the issue before us today is at most semantic. But the Court's "test" not only fails to distinguish *Henderson;* it also fails to provide any reasoned basis on which to approach such questions as whether a speedy trial claim is merged in a guilty plea. I believe the Court's departure today from the principles of *Henderson* and the cases preceding it must be recognized as a potentially major breach in the wall of certainty surrounding guilty pleas for which we have found constitutional sanction in those cases.

There is no indication in this record that respondent's guilty plea was the result of an agreement with the prose-

cutor. But the Court's basis for distinguishing the *Henderson* and *Brady* cases seems so insubstantial as to permit the doctrine of this case to apply to guilty pleas which have been obtained as a result of "plea bargains." In that event it will be not merely the State which stands to lose, but the accused defendant in the position of the respondent as well. Since the great majority of criminal cases are resolved by plea bargaining, defendants as a class have at least as great an interest in the finality of voluntary guilty pleas as do prosecutors. If that finality may be swept aside with the ease exhibited by the Court's approach today, prosecutors will have a reduced incentive to bargain, to the detriment of the many defendants for whom plea bargaining offers the only hope for ameliorating the consequences to them of a serious criminal charge.

III

But if, as I believe, a proper analysis of respondent's constitutional claim produces at most a violation of the standards laid down in *North Carolina* v. *Pearce, supra,* I agree with the Court, though not for the reasons it gives, that respondent's claim was not merged in his guilty plea. Imposition of sentence in violation of *Pearce* is not an "antecedent constitutional violation," since sentence is customarily imposed after a plea of guilty, and is a separate legal event from the determination by the Court that the defendant is in fact guilty of the offense with which he is charged.

If respondent's claim is properly analyzed in terms of *Pearce,* I would think that a result quite different from that mandated in the Court's opinion would obtain. *Pearce* and the decisions following it have made it clear that the wrong lies in the increased sentence, not in the judgment of conviction, and that the remedy for a *Pearce* defect is a remand for sentencing consistent with due

process. *North Carolina* v. *Rice*, 404 U. S. 244, 247–248 (1971). In *Rice* we concluded that the Court of Appeals had erred in ruling that *Pearce* authorized the expunging of Rice's conviction after his trial *de novo* in North Carolina:

> "It could not be clearer . . . that *Pearce* does not invalidate the conviction that resulted from Rice's second trial . . . . *Pearce*, in short, requires only resentencing; the conviction is not *ipso facto* set aside and a new trial required. Even if the higher sentence imposed after Rice's trial *de novo* was vulnerable under *Pearce*, Rice was entitled neither to have his conviction erased nor to avoid the collateral consequences flowing from that conviction and a proper sentence." *Ibid.*

Since Rice had completely served his sentence, rather than reaching the merits of Rice's *Pearce* claim, we remanded for a determination whether any collateral consequences flowed from his service of the longer sentence imposed after retrial, or whether the case was moot.

Here, while respondent faced the prospect of a more severe sentence at the conclusion of his felony trial in the Superior Court of North Carolina, it was by no means self-evident that this would be the result. The maximum sentence which he could receive on the misdemeanor count was one and one-half years, but nothing in the record indicates that the Superior Court judge might not impose a lesser penalty than that, or even grant probation. Nor is there any indication in the habeas record, which contains only a fragment of the state court proceedings, that the Superior Court judge might not at the conclusion of the trial and after a verdict of guilty have before him for sentencing purposes information which would support an augmented sentence under *Pearce*. In fact, the habeas court found that the sentence actually

imposed was more severe than that which could have been imposed under the misdemeanor charge. But the remedy for that violation should be a direction to the state court to resentence in accordance with *Pearce*, rather than an order completely annulling the conviction. Respondent was originally convicted of assaulting a fellow inmate with a deadly weapon, and later pleaded guilty to a charge of assaulting the inmate with a deadly weapon with intent to kill him. But in spite of both a verdict of guilty on one charge and a plea of guilty to the other, the Court's decision may well, as a practical matter, assure that no penalty whatever will be imposed on him.

MR. JUSTICE POWELL joins in Part II of this opinion.

FULLER *v.* OREGON

CERTIORARI TO THE COURT OF APPEALS OF OREGON

No. 73–5280. Argued March 26, 1974—Decided May 20, 1974

Petitioner, who pleaded guilty to a crime and was given a probationary sentence, conditioned upon his complying with a jail work-release program permitting him to attend college and also upon his reimbursing the county for the fees and expenses of an attorney and investigator whose services had been provided him because of his indigency, attacks the constitutionality of Oregon's recoupment statute, which was upheld on appeal. That law requires convicted defendants who are indigent at the time of the criminal proceedings against them but who subsequently acquire the financial means to do so, to repay the costs of their legal defense. Defendants with no likelihood of having the means to repay are not even conditionally obligated to do so, and those thus obligated are not subjected to collection procedures until their indigency has ended and no manifest hardship will result. *Held:*

1. The Oregon recoupment scheme does not violate the Equal Protection Clause of the Fourteenth Amendment. Pp. 46–50.

(a) The statute retains all the exemptions accorded to other judgment debtors, in addition to the opportunity to show that recovery of legal defense costs will impose "manifest hardship." *James* v. *Strange*, 407 U. S. 128, distinguished. Pp. 46–48.

(b) The statutory distinction between those who are convicted, on the one hand, and those who are not or whose convictions are reversed, on the other, is not an invidious classification, since the legislative decision not to impose a repayment obligation on a defendant forced to submit to criminal prosecution that does not end in conviction is objectively rational. Pp. 48–50.

2. The Oregon law does not infringe upon a defendant's right to counsel since the knowledge that he may ultimately have to repay the costs of legal services does not affect his ability to obtain such services. The challenged statute is thus not similar to a provision that "chill[s] the assertion of constitutional rights by penalizing those who choose to exercise them," *United States* v. *Jackson*, 390 U. S. 570, 581. Pp. 51–54.

12 Ore. App. 152, 504 P. 2d 1393, affirmed.

STEWART, J., delivered the opinion of the Court, in which BURGER, C. J., and WHITE, BLACKMUN, POWELL, and REHNQUIST, JJ., joined. DOUGLAS, J., filed an opinion concurring in the judgment, *post*, p. 54. MARSHALL, J., filed a dissenting opinion, in which BRENNAN, J., joined, *post*, p. 59.

J. Marvin Kuhn argued the cause and filed a brief for petitioner.

W. Michael Gillette, Solicitor General of Oregon, argued the cause for respondent. With him on the brief was *Lee Johnson*, Attorney General.*

MR. JUSTICE STEWART delivered the opinion of the Court.

In this case we are called upon to determine whether Oregon may constitutionally require a person convicted of a criminal offense to repay to the State the costs of providing him with effective representation of counsel, when he is indigent at the time of the criminal proceedings but subsequently acquires the means to bear the costs of his legal defense.

The petitioner Fuller pleaded guilty, on July 20, 1972, to an information charging him with sodomy in the third degree.[1] At the hearing on the plea and in other court proceedings he was represented by a local member of the bar appointed by the court upon the petitioner's representation that he was indigent and unable to hire a lawyer. Fuller's counsel in turn hired an investigator to aid in gathering facts for his defense, and the investigator's fees were also assumed by the State. Fuller was

**Richard S. Buckley, Marshall J. Hartman,* and *Wilbur F. Littlefield* filed a brief for the National Legal Aid and Defender Assn. as *amicus curiae* urging reversal.

[1] Other charges contained in the information against Fuller were dismissed when his guilty plea was accepted.

subsequently sentenced to five years of probation, conditioned upon his satisfactorily complying with the requirements of a work-release program at the county jail that would permit him to attend college, and also upon his reimbursement to the county of the fees and expenses of the attorney and investigator whose services had been provided him because of his indigent status. On appeal to the Oregon Court of Appeals, his principal contention was that the State could not constitutionally condition his probation on the repayment of these expenses.[2] With one judge dissenting, the imposition of his sentence was affirmed, 12 Ore. App. 152, 504 P. 2d 1393, and the Supreme Court of Oregon subsequently denied Fuller's petition for review. Because of the importance of the question presented and the conflict of opinion on the constitutional issue involved,[3] we granted certiorari, 414 U. S. 1111.

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[2] In addition, Fuller argued that the section of the Oregon recoupment statute authorizing an obligation to repay "expenses specially incurred by the state in prosecuting the defendant," Ore. Rev. Stat. § 161.665 (2), see n. 5, *infra*, was not intended by the state legislature to include counsel fees. This issue of state law was resolved against the petitioner in the state court, and properly is not raised here. *Murdock* v. *City of Memphis*, 20 Wall. 590.

[3] Courts of some other States, in reviewing legislation similar to that in question here, have expressed views on the constitutionality of the recoupment of defense costs inconsistent with the decision of the Oregon Court of Appeals in this case. *In re Allen*, 71 Cal. 2d 388, 455 P. 2d 143; *Opinion of the Justices*, 109 N. H. 508, 256 A. 2d 500; *State ex rel. Brundage* v. *Eide*, 83 Wash. 2d 676, 521 P. 2d 706. Cf. *Strange* v. *James*, 323 F. Supp. 1230 (Kan.), aff'd on other grounds, 407 U. S. 128. See generally American Bar Association Project on Standards for Criminal Justice, Providing Defense Services § 6.4, pp. 58–59 (Approved Draft 1968); Comment, Reimbursement of Defense Costs as a Condition of Probation for Indigents, 67 Mich. L. Rev. 1404 (1969); Comment, Charging Costs of Prosecution to the Defendant, 59 Geo. L. J. 991 (1971).

I

We begin with consideration of the plan and operation of the challenged statute. By force of interpretation of the State's Constitution and comprehensive legislation, Oregon mandates that every defendant in a criminal case must be assigned a lawyer at state expense if "[i]t appears to the court that the defendant is without means and is unable to obtain counsel." Ore. Rev. Stat. § 135.050 (1)(d) (1973).[4] As part of a recoupment statute passed in 1971, Oregon requires that in some cases all or part of the "expenses specially incurred by the state in prosecuting the defendant," § 161.665 (2), be repaid to the State, and that when a convicted person is placed on probation repayment of such expenses may be made a condition of probation.[5] These expenses include the costs of the convicted person's legal defense.[6]

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[4] Ore. Rev. Stat. § 135.050 (3)(a) (1973) directs that counsel be appointed for an indigent defendant when he is "[c]harged with a crime."

[5] Ore. Rev. Stat. § 161.665 provides:

"(1) The court may require a convicted defendant to pay costs.

"(2) Costs shall be limited to expenses specially incurred by the state in prosecuting the defendant. They cannot include expenses inherent in providing a constitutionally guaranteed jury trial or expenditures in connection with the maintenance and operation of government agencies that must be made by the public irrespective of specific violations of law.

"(3) The court shall not sentence a defendant to pay costs unless the defendant is or will be able to pay them. In determining the amount and method of payment of costs, the court shall take account of the financial resources of the defendant and the nature of the burden that payment of costs will impose.

"(4) A defendant who has been sentenced to pay costs and who is not in contumacious default in the payment thereof may at any time petition the court which sentenced him for remission of the payment of costs or of any unpaid portion thereof. If it appears to the satisfaction of the court that payment of the amount due will

[*Footnote 6 is on p. 45*]

As the Oregon appellate court noted in its opinion in this case, however, the requirement of repayment "is never mandatory." 12 Ore. App., at 156, 504 P. 2d,

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impose manifest hardship on the defendant or his immediate family, the court may remit all or part of the amount due in costs, or modify the method of payment under ORS 161.675."

Ore. Rev. Stat. § 161.675 provides:

"(1) When a defendant is sentenced to pay a fine or costs, the court may grant permission for payment to be made within a specified period of time or in specified instalments. If no such permission is included in the sentence the fine shall be payable forthwith.

"(2) When a defendant sentenced to pay a fine or costs is also placed on probation or imposition or execution of sentence is suspended, the court may make payment of the fine or costs a condition of probation or suspension of sentence."

Ore. Rev. Stat. § 161.685 provides:

"(1) When a defendant sentenced to pay a fine defaults in the payment thereof or of any instalment, the court on motion of the district attorney or upon its own motion may require him to show cause why his default should not be treated as contempt of court, and may issue a show cause citation or a warrant of arrest for his appearance.

"(2) Unless the defendant shows that his default was not attributable to an intentional refusal to obey the order of the court or to a failure on his part to make a good faith effort to make the payment, the court may find that his default constitutes contempt and may order him committed until the fine, or a specified part thereof, is paid.

"(3) When a fine is imposed on a corporation or unincorporated association, it is the duty of the person authorized to make disbursement from the assets of the corporation or association to pay the fine from those assets, and his failure to do so may be held to be contempt unless he makes the showing required in subsection (2) of this section.

"(4) The term of imprisonment for contempt for nonpayment of fines shall be set forth in the commitment order, and shall not exceed one day for each $25 of the fine, 30 days if the fine was imposed upon conviction of a violation or misdemeanor, or one year in any other case, whichever is the shorter period. A person committed for non-

at 1395. Rather, several conditions must be satisfied before a person may be required to repay the costs of his legal defense. First, a requirement of repayment may be imposed only upon a *convicted* defendant; those who are acquitted, whose trials end in mistrial or dismissal, and those whose convictions are overturned upon appeal face no possibility of being required to pay. Ore. Rev. Stat. § 161.665 (1). Second, a court may not order a convicted person to pay these expenses unless he "is or will be able to pay them." § 161.665 (3). The sentencing court must "take account of the financial resources of the defendant and the nature of the burden that payment of costs will impose." *Ibid.* As the Oregon court put the matter in this case, no requirement to repay may be imposed if it appears at the time of sentencing that "there is no likelihood that a defendant's indigency will end . . . ." 12 Ore. App., at 159, 504 P. 2d, at 1397. Third, a convicted person under an obligation to repay "may at any time petition the court which sentenced him for remission of the payment of costs or of any unpaid portion thereof." Ore. Rev. Stat. § 161.665 (4). The court is empowered to remit if payment "will impose manifest hardship on the defendant or his imme-

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payment of a fine shall be given credit toward payment for each day of imprisonment at the rate specified in the commitment order.

"(5) If it appears to the satisfaction of the court that the default in the payment of a fine is not contempt, the court may enter an order allowing the defendant additional time for payment, reducing the amount thereof or of each instalment or revoking the fine or the unpaid portion thereof in whole or in part.

"(6) A default in the payment of a fine or costs or any instalment thereof may be collected by any means authorized by law for the enforcement of a judgment. The levy of execution for the collection of a fine shall not discharge a defendant committed to imprisonment for contempt until the amount of the fine has actually been collected."

[6] See n. 2, *supra*.

diate family . . . ." *Ibid.* Finally, no convicted person may be held in contempt for failure to repay if he shows that "his default was not attributable to an intentional refusal to obey the order of the court or to a failure on his part to make a good faith effort to make the payment . . . ." § 161.685 (2).

Thus, the recoupment statute is quite clearly directed only at those convicted defendants who are indigent at the time of the criminal proceedings against them but who subsequently gain the ability to pay the expenses of legal representation. Defendants with no likelihood of having the means to repay are not put under even a conditional obligation to do so, and those upon whom a conditional obligation is imposed are not subjected to collection procedures until their indigency has ended and no "manifest hardship" will result. The contrast with appointment-of-counsel procedures in States without recoupment requirements [7] is thus relatively small: a lawyer is provided at the expense of the State to all defendants who are unable, even momentarily, to hire one, and the obligation to repay the State accrues only to those who later acquire the means to do so without hardship.

II

The petitioner's first contention is that Oregon's recoupment system violates the Equal Protection Clause of the Fourteenth Amendment because of various classifications explicitly or implicitly drawn by the legislative provisions. He calls attention to our decision in *James* v. *Strange,* 407 U. S. 128, which held invalid under the Equal Protection Clause a law enacted by Kansas that

[7] The recoupment provisions of other States are set out in the Court's opinion in *James* v. *Strange,* 407 U. S. 128, 132–133, and n. 8. The federal reimbursement provision is found in 18 U. S. C. § 3006A (f).

was somewhat similar to the legislation now before us. But the offending aspect of the Kansas statute was its provision that in an action to compel repayment of counsel fees "[n]one of the exemptions provided for in the code of civil procedure [for collection of other judgment debts] shall apply to any such judgment . . . ," Kan. Stat. Ann. § 22–4513 (a) (Supp. 1971), a provision which "strip[ped] from indigent defendants the array of protective exemptions Kansas has erected for other civil judgment debtors . . . ." 407 U. S., at 135.[8] The Court found that the elimination of the exemptions normally available to judgment debtors "embodie[d] elements of punitiveness and discrimination which violate the rights of citizens to equal treatment under the law." *Id.*, at 142.

The Oregon statute under consideration here suffers from no such infirmity. As the Oregon Court of Appeals observed, "[n]o denial of the exemptions from execution afforded to other judgment debtors is included in the Oregon statutes." 12 Ore. App., at 159, 504 P. 2d, at 1397. Indeed, a separate provision directs that "[a] judgment that the defendant pay money, either as a fine or as costs and disbursements of the action, or both, shall be docketed as a judgment in a civil action and with like effect . . . ." Ore. Rev. Stat. § 137.180. The convicted person from whom recoupment is sought thus retains all the exemptions accorded other judgment debtors, in addition to the opportunity to show at any time that recovery of the costs of his legal defense will impose "manifest hardship," § 161.665 (4). The legislation before us,

[8] The Kansas statute allowed only one exception from the blanket denial of exemptions usually available to judgment debtors, permitting debtors upon whom judgments for costs of legal defense were executed to maintain their homesteads intact. 407 U. S., at 135.

therefore, is wholly free of the kind of discrimination that was held in *James* v. *Strange* to violate the Equal Protection Clause.[9]

The petitioner contends further, however, that the Oregon statute denies equal protection of the laws in another way—by discriminating between defendants who

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[9] The dissenting opinion today argues that Fuller's conditional obligation to repay constitutes an impermissible discrimination based on wealth in violation of the Equal Protection Clause. More precisely, the argument is made that, unlike a nonindigent defendant, an indigent defendant's "failure to pay his debt can result in his being sent to prison." *Post*, at 60. This contention was not made in the petitioner's brief or oral argument before this Court, and appears not to have been raised in the Oregon courts. It is, therefore, not properly before us. See n. 11, *infra*. Furthermore, insofar as the dissent deals with Art. 1, § 19, of the Oregon Constitution which forbids "imprisonment for debt," the dissent purports to resolve questions of state law that this Court does not have power to decide. *Murdock* v. *City of Memphis*, 20 Wall. 590.

More fundamentally, the imposition of a repayment requirement upon those for whom counsel was appointed but not upon those who hired their own counsel simply does not constitute invidious discrimination against the poor. Indeed, the entire thrust of Oregon's appointment-of-counsel plan is to insure an indigent effective representation of counsel at all significant steps of the criminal process. Those who are indigent may be conditionally required to repay because only they, in contrast to nonindigents, were provided counsel by the State in the first place. Moreover, the fact that a conditional requirement to repay may be made a condition of probation does not mean that the State "impose[s] unduly harsh or discriminatory terms merely because the obligation is to the public treasury rather than to a private creditor." *James* v. *Strange*, 407 U. S., at 138. Under Oregon's recoupment statute revocation of probation is not a collection device used by the State to enforce debts to it, but is a sanction imposed for "an intentional refusal to obey the order of the court," Ore. Rev. Stat. § 161.685 (2). Since an order to repay can be entered only when a convicted person is financially able but unwilling to reimburse the State, the constitutional invalidity found in *James* v. *Strange* simply does not exist.

are convicted, on the one hand, and those who are not convicted or whose convictions are reversed, on the other. Our review of this distinction, of course, is a limited one. As the Court stated in *James* v. *Strange:* "We do not inquire whether this statute is wise or desirable . . . . Misguided laws may nonetheless be constitutional." 407 U. S., at 133. Our task is merely to determine whether there is "some rationality in the nature of the class singled out." *Rinaldi* v. *Yeager,* 384 U. S. 305, 308–309. See also *McGinnis* v. *Royster,* 410 U. S. 263; *McGowan* v. *Maryland,* 366 U. S. 420. In *Rinaldi* the Court found impermissible New Jersey's decision to single out prisoners confined to state institutions for imposition of an obligation to repay to the State costs incurred in providing free transcripts of trial court proceedings required by this Court's decision in *Griffin* v. *Illinois,* 351 U. S. 12. The legislative decision to tax those confined to prison but not those also convicted but given a suspended sentence, probation, or a fine without imprisonment was found to be invidiously discriminatory and thus violative of the requirements of the Equal Protection Clause. In the case before us, however, the sole distinction is between those who are ultimately convicted and those who are not.[10]

We conclude that this classification is wholly non-invidious. A defendant whose trial ends without con-

[10] The petitioner also claims in his brief that a requirement to repay legal defense expenses has been imposed only on convicted defendants placed on probation, and "has not been applied to those convicted indigents who were sentenced to terms of imprisonment." While this distinction might well be justified on the ground that those released on probation are more likely than those incarcerated to have the ability to earn money to repay, we need not reach this issue since the statute itself makes no such distinction, and the petitioner has not demonstrated on this record that the State has engaged in any pattern or practice embracing it.

viction or whose conviction is overturned on appeal has been seriously imposed upon by society without any conclusive demonstration that he is criminally culpable. His life has been interrupted and subjected to great stress, and he may have incurred financial hardship through loss of job or potential working hours. His reputation may have been greatly damaged. The imposition of such dislocations and hardships without an ultimate conviction is, of course, unavoidable in a legal system that requires proof of guilt beyond a reasonable doubt and guarantees important procedural protections to every defendant in a criminal trial. But Oregon could surely decide with objective rationality that when a defendant has been forced to submit to a criminal prosecution that does not end in conviction, he will be freed of any potential liability to reimburse the State for the costs of his defense. This legislative decision reflects no more than an effort to achieve elemental fairness and is a far cry from the kind of invidious discrimination that the Equal Protection Clause condemns.[11]

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[11] The petitioner's brief also raises, without extended discussion, various due process claims that imposition of the conditional obligation to repay was made without sufficient notice or hearing. Since these contentions appear not to have been raised in the state courts, and were not discussed by the Oregon Court of Appeals, we need not reach them here. "[T]his Court has stated that when . . . the highest state court has failed to pass upon a federal question, it will be assumed that the omission was due to want of proper presentation in the state courts, unless the aggrieved party in this Court can affirmatively show the contrary." *Street* v. *New York*, 394 U. S. 576, 582. We note in passing, however, that the recoupment statutes, including a schedule of fees, were published in the Oregon Revised Statutes at the time of the petitioner's plea, and further that both Oregon's judgment execution statute and its parole revocation procedures provide for a hearing before execution can be levied or probation revoked.

III

The petitioner's second basic contention is that Oregon's recoupment statute infringes upon his constitutional right to have counsel provided by the State when he is unable because of indigency to hire a lawyer. *Gideon* v. *Wainwright,* 372 U. S. 335; *Argersinger* v. *Hamlin,* 407 U. S. 25. The argument is not that the legal representation actually provided in this case was ineffective or insufficient. Nor does the petitioner claim that the fees and expenses he may have to repay constitute unreasonable compensation for the defense provided him. Rather, he asserts that a defendant's knowledge that he may remain under an obligation to repay the expenses incurred in providing him legal representation might impel him to decline the services of an appointed attorney and thus "chill" his constitutional right to counsel.

This view was articulated by the Supreme Court of California, in a case invalidating California's recoupment legislation, in the following terms:

> "[W]e believe that as knowledge of [the recoupment] practice has grown and continues to grow many indigent defendants will come to realize that the judge's offer to supply counsel is not the gratuitous offer of assistance that it might appear to be; that, in the event the case results in a grant of probation, one of the conditions might well be the reimbursement of the county for the expense involved. This knowledge is quite likely to deter or discourage many defendants from accepting the offer of counsel despite the gravity of the need for such representation as emphasized by the [Supreme] [C]ourt in *Gideon* . . . ." *In re Allen,* 71 Cal. 2d 388, 391, 455 P. 2d 143, 144.

We have concluded that this reasoning is wide of the constitutional mark.

The focal point of this Court's decisions securing the right to state-appointed counsel for indigents was the "noble ideal" that every criminal defendant be guaranteed not only "procedural and substantive safeguards designed to assure fair trials before impartial tribunals in which every defendant stands equal before the law," but also the expert advice necessary to recognize and take advantage of those safeguards. *Gideon* v. *Wainwright, supra,* at 344. In the now familiar words of the Court's seminal opinion in *Powell* v. *Alabama,* 287 U. S. 45, 68–69, quoted in *Gideon,* at 344–345:

> "The right to be heard would be, in many cases, of little avail if it did not comprehend the right to be heard by counsel. Even the intelligent and educated layman has small and sometimes no skill in the science of law. If charged with crime, he is incapable, generally, of determining for himself whether the indictment is good or bad. He is unfamiliar with the rules of evidence. Left without the aid of counsel he may be put on trial without a proper charge, and convicted upon incompetent evidence, or evidence irrelevant to the issue or otherwise inadmissible. He lacks both the skill and knowledge adequately to prepare his defense, even though he have a perfect one. He requires the guiding hand of counsel at every step in the proceedings against him. Without it, though he be not guilty, he faces the danger of conviction because he does not know how to establish his innocence."

Oregon's system for providing counsel quite clearly does not deprive any defendant of the legal assistance necessary to meet these needs. As the State Court of Appeals observed in this case, an indigent is entitled to

free counsel "when he needs it"—that is, during every stage of the criminal proceedings against him. 12 Ore. App., at 158–159, 504 P. 2d, at 1396. The fact that an indigent who accepts state-appointed legal representation knows that he might someday be required to repay the costs of these services in no way affects his eligibility to obtain counsel. The Oregon statute is carefully designed to insure that only those who actually become capable of repaying the State will ever be obliged to do so.[12] Those who remain indigent or for whom repayment would work "manifest hardship" are forever exempt from any obligation to repay.

We live in a society where the distribution of legal assistance, like the distribution of all goods and services, is generally regulated by the dynamics of private enterprise. A defendant in a criminal case who is just above the line separating the indigent from the nonindigent must borrow money, sell off his meager assets, or call upon his family or friends in order to hire a lawyer. We cannot say that the Constitution requires that those only slightly poorer must remain forever immune from any

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[12] The limitation of the obligation to repay to those who are found able to do so also disposes of the argument, presented by an *amicus curiae*, that revocation of probation for failure to pay constitutes an impermissible discrimination based on wealth. See *Tate* v. *Short*, 401 U. S. 395; *Williams* v. *Illinois*, 399 U. S. 235. As the Court stated in *Tate* v. *Short*: "We emphasize that our holding today does not suggest any constitutional infirmity in imprisonment of a defendant with the means to pay a fine who refuses or neglects to do so." 401 U. S., at 400.

Similarly, the wording of Oregon's statute makes it clear that a determination that an indigent "will be able" to make subsequent repayment is a condition necessary for the initial imposition of the obligation to make repayment, but is not itself a condition for granting probation, or even a factor to be considered in determining whether probation should be granted.

obligation to shoulder the expenses of their legal defense, even when they are able to pay without hardship.

This case is fundamentally different from our decisions relied on by the petitioner which have invalidated state and federal laws that placed a penalty on the exercise of a constitutional right. See *Uniformed Sanitation Men* v. *Sanitation Comm'r*, 392 U. S. 280; *Gardner* v. *Broderick*, 392 U. S. 273; *United States* v. *Jackson*, 390 U. S. 570. Unlike the statutes found invalid in those cases, where the provisions "had no other purpose or effect than to chill the assertion of constitutional rights by penalizing those who choose to exercise them," *id.*, at 581, Oregon's recoupment statute merely provides that a convicted person who later becomes able to pay for his counsel may be required to do so. Oregon's legislation is tailored to impose an obligation only upon those with a foreseeable ability to meet it, and to enforce that obligation only against those who actually become able to meet it without hardship.

The judgment of the Court of Appeals of Oregon is affirmed.

It is so ordered.

MR. JUSTICE DOUGLAS, concurring in the judgment.

The petitioner in this case, charged with a felony, received court-appointed counsel, which is available in Oregon to a defendant who executes a statement that he is unable to obtain counsel, when it appears to the court that the defendant is without means. Ore. Rev. Stat. §§ 135.050 (1)(c), (d) (1973). Petitioner was convicted, and sentenced to five years' probation. One of the conditions of probation was that petitioner reimburse the county for the cost of his appointed attorney's fees and for the expenses of a defense investigator.[1] These costs were

[1] In this case, the petitioner's father apparently paid the costs, and petitioner will repay his father.

assessed pursuant to the Oregon recoupment statute, §§ 161.665–161.685, which authorizes the sentencing court to require a convicted defendant to pay certain costs [2] and to condition probation on such payment.

Although a defendant might have been indigent at the time of trial, the Oregon statutory scheme recognizes that at some point after trial a defendant may escape from indigency. As noted, the recoupment statute thus allows the court to require a convicted defendant to pay costs. § 161.665 (1). Payment of the costs may be made a condition of probation. § 161.675 (2). But it forbids the court to impose such a requirement at the time of sentencing unless the defendant at that time "is or will be able to" pay those costs and requires the court to consider the "nature of the burden that payment of costs will impose" on the defendant. § 161.665 (3). Under the statute, a court which has sentenced a defendant to pay costs may remit the payment of the amount due, or modify the method of payment, if it appears that the payment will impose manifest hardship on the defendant or his immediate family. § 161.665 (4).

[2] The costs which can be assessed are limited by statute to those "specially incurred" by the State in prosecuting a defendant. Ore. Rev. Stat. § 161.665 (2). The Oregon Court of Appeals found that most costs on the prosecution side of the case could not be charged to a defendant, including police investigations, district attorneys' salaries, and sheriffs' salaries. 12 Ore. App. 152, 157, 504 P. 2d 1393, 1396. Also, jury fees and the costs of summoning jurors cannot be charged to the defendant. *Ibid.*; see Ore. Rev. Stat. § 161.665 (2). The costs which can be charged appear limited to those incurred for a defendant's benefit, such as defense counsel, defense investigators, and so on, which would be borne by a non-indigent defendant in a criminal trial. In addition, the Oregon statutory scheme places limits on the fees which an appointed counsel can receive, except in "extraordinary circumstances," thus limiting the eventual responsibility of a defendant under the recoupment statute. § 135.055.

The Court of Appeals of Oregon construed the statutory scheme in this case to limit sharply the discretion of the trial court to require the repayment of costs. 12 Ore. App. 152, 504 P. 2d 1393. As the court interpreted the statute, a defendant can be required to repay appointed counsel's fee *"only if and when he is no longer indigent."* *Id.*, at 159, 504 P. 2d, at 1397 (emphasis added). While payment of costs may be made a condition of probation, probation can be revoked only if the court specifically finds that "(1) the defendant has the present financial ability to repay the costs involved (either all or by installments) without hardship to himself or his family . . . *and* (2) the defendant's failure to repay . . . is an intentional, contumacious default . . . ." *Ibid.* Revocation is improper if both of these elements are not established.

The narrow construction of the Oregon recoupment statute in this case disposes of petitioner's claim that the statute "chills" the exercise of the right to counsel. Repayment cannot be required until a defendant is able to pay the costs, and probation cannot be revoked for nonpayment unless there is a specific finding that payment would not work hardship on a defendant or his family. Under these circumstances, the "chill" on the exercise of the right to counsel is no greater than that imposed on a nonindigent defendant without great sums of money. Even though such a defendant can afford counsel, he might well be more ready to accept free appointed counsel than to retain counsel himself. Yet a State is not therefore required by the Federal Constitution to provide appointed counsel for nonindigent defendants.[3]

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[3] Indeed, while a defendant who is not indigent at the time of trial must pay counsel fees even if acquitted, the Oregon recoup-

Nor is it a denial of equal protection to assess costs only against those defendants who are convicted. The acquitted defendant has prevailed at trial in defending against the charge brought by the State. It is rational that the State not recover costs from such a defendant while recovering costs from a defendant who has been found guilty beyond a reasonable doubt of the crime that necessitated the trial. Similarly, too, it is rational not to assess defendants against whom charges have been dismissed, since the State has not proved its charges against them.[4]

My Brother MARSHALL argues that the Oregon recoupment statute denies indigent defendants equal protection of the laws in that it contemplates revocation of probation and subsequent imprisonment for nonpayment of counsel fees. He notes that Art. 1, § 19, of the Oregon Constitution provides that "[t]here shall be no imprisonment for debt, except in case of fraud or absconding debtors," and argues that a defendant who failed to pay a bill to his retained counsel could not be imprisoned.

I do not believe that this claim was properly preserved below or is properly before this Court. Petitioner did argue that the possibility of imprisonment for debts owed the State under the recoupment statute denied him equal protection, but there is no indication that the Oregon Court of Appeals was alerted to the problems

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ment statutes do not permit the assessment of costs against a defendant who is not convicted.

[4] Petitioner, relying on *James* v. *Strange*, 407 U. S. 128, also claims that the recoupment statute is impermissible because it fails to provide the same exemptions from execution provided other Oregon debtors. The Oregon Court of Appeals in this case held that all exemptions provided other debtors also apply under the recoupment statute. 12 Ore. App., at 159, 504 P. 2d, at 1397. Petitioner's claim that the statute deprives him of due process was not raised below and hence is not before this Court.

posed by Art. 1, § 19. Petitioner did not even mention the section in his brief before this Court.[5] Yet there is, as my Brother MARSHALL notes, an apparent inconsistency between Art. 1, § 19, and the recoupment statute. It may be, therefore, that the Oregon courts would strike down the statute as being inconsistent with the constitutional provision if they faced the issue. But on the record of this case, they have not made that determination of state law. Nor can we assume that the Oregon courts have in fact implicitly rejected the applicability of Art. 1, § 19, in upholding the recoupment statute in this case; there is no evidence that an Oregon court must, or even may, *sua sponte*, consider arguments not argued or briefed to it.

While this Court may at times adopt theories different from those urged by counsel or urged before the state courts when resolving a particular question, see *Dewey* v. *Des Moines*, 173 U. S. 193, 198; cf. *Stanley* v. *Illinois*, 405 U. S. 645, 658 n. 10, it will not pass on questions substantively different from those presented to the state courts, even when the federal claim is nominally based on the same federal constitutional clause relied on before the state courts, see *Wilson* v. *Cook*, 327 U. S. 474, 483–484. More crucially, the federal Equal Protection Clause could be violated in this case only if a particular construction of state law were to be adopted by the state

[5] The opinion of the Oregon Court of Appeals, including the dissent, does not mention Art. 1, § 19. Petitioner's equal protection argument here was based on claims that the recoupment statute did not provide the same statutory exemptions granted other Oregon debtors, discriminated against convicted defendants as opposed to acquitted defendants and defendants who had charges dismissed, and favored defendants who were sentenced to the penitentiary. The Art. 1, § 19, problem was brought to the attention of the Court only by the *amicus curiae* brief of the National Legal Aid and Defender Association.

courts. That construction was not adopted on the record before us, and we cannot simply assume that the state court would so rule and strike down the state statute on the basis of that assumption.

For these reasons, I do not reach the merits of the equal protection question presented by the dissent. And since that question is not properly before us, I believe that the Court errs in rendering an advisory opinion on the merits, an error compounded by the absence of any record below amplifying those merits. The Court not only renders an advisory opinion; it renders it in a vacuum. The proper construction of state law, and the proper resolution of the dependent equal protection claim, would properly be raised by another litigant or by petitioner by way of collateral attack.

In view of the manner in which the application of the recoupment statute has been stringently narrowed by the Court of Appeals of Oregon and because the claim urged by the dissent is not properly before the Court, I concur in the judgment of the Court.

MR. JUSTICE MARSHALL, with whom MR. JUSTICE BRENNAN joins, dissenting.

In my view, the Oregon recoupment statute at issue in this case discriminates against indigent defendants in violation of the Equal Protection Clause and the principles established by this Court in *James* v. *Strange*, 407 U. S. 128 (1972). In that case we held unconstitutional under the Equal Protection Clause a Kansas recoupment statute because it failed to provide equal treatment between indigent defendants and other civil judgment debtors. We relied on the fact that indigent defendants were not entitled to the protective exemptions Kansas had erected for other civil judgment debtors.

The Oregon recoupment statute at issue here similarly provides unequal treatment between indigent defendants

and other civil judgment debtors. The majority obfuscates the issue in this case by focusing solely on the question whether the Oregon statute affords an indigent defendant the same protective exemptions provided other civil debtors. True, as construed by the Oregon Court of Appeals, the statute does not discriminate in this regard. But the treatment it affords indigent defendants remains unequal in another, even more fundamental, respect. The important fact which the majority ignores is that under Oregon law, the repayment of the indigent defendant's debt to the State can be made a condition of his probation, as it was in this case. Petitioner's failure to pay his debt can result in his being sent to prison. In this respect the indigent defendant in Oregon, like the indigent defendant in *James* v. *Strange*, is treated quite differently from other civil judgment debtors.

Petitioner's "predicament under this statute comes into sharper focus when compared with that of one who has hired counsel in his defense." 407 U. S., at 136. Article 1, § 19, of the Oregon Constitution provides that "[t]here shall be no imprisonment for debt, except in case of fraud or absconding debtors." Hence, the nonindigent defendant in a criminal case in Oregon who does not pay his privately retained counsel, even after he obtains the means to do so, cannot be imprisoned for such failure. The lawyer in that instance must enforce his judgment through the normal routes available to a creditor—by attachment, lien, garnishment, or the like. Petitioner, on the other hand, faces five years behind bars if he fails to pay his "debt" arising out of the appointment of counsel.

Article 1, § 19, of the Oregon Constitution is representative of a fundamental state policy consistent with the modern rejection of the practice of imprisonment for debt as unnecessarily cruel and essentially counterproductive.

Since Oregon chooses not to provide imprisonment for debt for well-heeled defendants who do not pay their retained counsel, I do not believe it can, consistent with the Equal Protection Clause, imprison an indigent defendant for his failure to pay the costs of his appointed counsel.[1] For as we held in *James* v. *Strange*, a State may not "impose unduly harsh or discriminatory terms merely because the obligation is to the public treasury rather than to a private creditor." 407 U. S., at 138.

I would therefore hold the Oregon recoupment statute unconstitutional under the Equal Protection Clause insofar as it permits payment of the indigent defendant's debt to be made a condition of his probation.[2] I respectfully dissent.

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[1] The majority argues that we have recognized no constitutional infirmity in imprisoning a defendant with the means to pay a fine who refuses or neglects to do so. *Ante*, at 53 n. 12. This case does not involve a fine, however, but rather enforcement of a debt for legal services. The fact remains that Oregon imprisons a defendant with appointed counsel who refuses or neglects to pay his debt for legal services even though able to pay, but does not imprison a defendant with retained counsel in the same circumstances.

[2] In light of my disposition of the equal protection claim, I have no occasion to consider petitioner's contention that some other defendant's knowledge that he may have to reimburse the State for providing him legal representation might impel him to decline the services of an appointed attorney and thus chill his Sixth Amendment right to counsel. In any event, in my view such a claim could more appropriately be considered by this Court in the context of an actual case involving a defendant who, unlike petitioner, had refused appointed counsel and contended that his refusal was not a knowing and voluntary waiver of his Sixth Amendment rights because it was based upon his fear of bearing the burden of a debt for appointed counsel or upon his failure to understand the limitations the State imposes on such a debt.

KOSYDAR, TAX COMMISSIONER OF OHIO *v.* NATIONAL CASH REGISTER CO.

CERTIORARI TO THE SUPREME COURT OF OHIO

No. 73-629. Argued March 19, 1974—Decided May 20, 1974

Cash registers and other machines built to foreign buyers' specifications, which were warehoused in Ohio awaiting shipment abroad, title, possession, and control remaining in respondent manufacturer, *held* not immune from state ad valorem tax, since the prospect of eventual exportation, however certain, did not start the process of exportation and move the machines into the export stream, without which the immunity from local taxation conferred by the Import-Export Clause of the Constitution was not available. *Empresa Siderurgica* v. *County of Merced,* 337 U. S. 154. Pp. 65-71.

35 Ohio St. 2d 166, 298 N. E. 2d 559, reversed.

STEWART, J., delivered the opinion for a unanimous Court.

Dwight C. Pettay, Jr., Assistant Attorney General of Ohio, argued the cause for petitioner. With him on the briefs were *William J. Brown,* Attorney General, and *Maryann B. Gall,* Assistant Attorney General.

Roger F. Day argued the cause for respondent. With him on the brief was *Carlton S. Dargusch, Jr.*

MR. JUSTICE STEWART delivered the opinion of the Court.

The Import-Export Clause of the Constitution, Art. I, § 10, cl. 2, provides:

> "No State shall, without the Consent of the Congress, lay any Imposts or Duties on Imports or Exports, except what may be absolutely necessary for executing it's inspection Laws: and the net Produce of all Duties and Imports, laid by any State on

> Imports or Exports, shall be for the Use of the Treasury of the United States; and all such Laws shall be subject to the Revision and Controul of the Congress."

The issue for decision in this case is whether the assessment of an ad valorem personal property tax by the petitioner Tax Commissioner of Ohio upon certain property of the respondent is in conflict with this Clause.

I

The respondent National Cash Register Co. (NCR) has for many years engaged in the manufacture of cash registers, accounting machines, and electronic data processing systems, which it markets worldwide. Its home offices, main production plant, and warehouse are located in Dayton, Ohio. For marketing purposes, NCR is organized into two divisions, domestic and international, each wholly separated from the other. It is with the operations of the latter division that this case is concerned.

NCR maintains no inventory of machines which are available to meet incoming orders from foreign customers. Rather, when a salesman from the international division receives an order from a customer, an individual order form is completed. The machine is then built to specification, taking into account the commercial peculiarities of the country to which it is to be shipped and the buyer's individual needs.

After manufacture, the machine is inspected, packed, and crated for shipment abroad. The crated machine is then taken to an NCR warehouse in Dayton, to await foreign shipment.[1] The machines relevant to

[1] There is often a time lag between production and final shipment, and an inventory of international machines is therefore built up at the Dayton warehouse. The delays in eventual shipment occur for a

this case were in storage in the Dayton warehouse, awaiting shipment, on December 31, 1967, when the petitioner Tax Commissioner assessed a personal property tax upon them.[2]

NCR appealed the Commissioner's assessment to the Board of Tax Appeals of the Ohio Department of Taxation. Its basic claim was that the "international inventory" in the Dayton warehouse was made up of exports, and thus was immune from state taxation under the Import-Export Clause. In support of this contention, NCR offered evidence to show that, because of their unique construction and special adaptation for foreign use, the crated machines were not salable domestically. Further evidence was offered to show that no piece of equipment built for the international division has ever gone anywhere but into that division; that there is no recorded instance of a machine that was sold to a foreign purchaser being returned; and that no exported item has ever found its way back into the United States market.[3]

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number of reasons. In some cases, recipient countries will not allow partial shipments, so when a large order has been placed and the production cycle is slow, the machines must be consolidated and stored prior to shipment. In the electronic data processing area, the component parts of a shipment are often produced at several different locations, necessitating a consolidation prior to shipment. In other instances, delay in final shipment is caused by difficulties in procuring importation licenses or the uncertainties of the international monetary situation.

[2] Under Ohio Rev. Code Ann. § 5709.01, all personal property located and used in business within the State is subject to an ad valorem tax. Ohio Rev. Code Ann. § 5711.16 provides that articles which have at any time been manufactured are subject to the tax.

[3] A number of factors make domestic sales of the machines impractical. For one thing, the keyboards, printing mechanisms, characters, dispensing mechanisms, and decimal point placement of the machines are geared to the particular monetary system employed

The Board of Tax Appeals nonetheless upheld the Commissioner's assessment. It ruled that even if the crated machines were irrevocably committed to export, the immunity from state taxation conferred by Art. I, § 10, cl. 2, did not attach until the property actually started on its journey to a foreign destination. Since the machines here had not yet entered the export stream, the Board of Tax Appeals concluded that they were still subject to the personal property tax.

The Supreme Court of Ohio reversed this decision by a divided vote. 35 Ohio St. 2d 166, 298 N. E. 2d 559. Relying on the evidence about the domestic nonsalability of the machines, the state court concluded that there was a "certainty of export" in this case. Given that "certainty," the court thought it irrelevant for Import-Export Clause purposes that the taxed machines had not, on the date of the assessment, been moved from the storage facility in Dayton. We granted certiorari, 414 U. S. 1111, because the case seemed to present important questions touching the accommodation of state and federal interests under the Constitution.

II

By its own terms, the prohibition on taxation contained in the Import-Export Clause is absolute; no duties or imposts are allowed "except what may be absolutely necessary for executing [a State's] inspection Laws." [4]

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in the customer's country. Moreover, the machines are quite often designed for use on electrical systems not prevalent in this country. And, even when mechanical problems do not exist, the fact remains that merchandising techniques in this country are considerably more sophisticated than those in many other nations, so as to make machines designed for foreign use somewhat obsolete in the domestic market.

[4] There is no claim that this exception is applicable in any way in the present case.

Consequently, the essential question in cases involving the Clause is a narrow one: is the property upon which a tax has been sought to be imposed an "export," and thus entitled to protection under the provision's literal terms?

The seminal case on the subject is *Coe* v. *Errol*, 116 U. S. 517. *Coe* involved a shipment of spruce logs that had been hewn at various locations in Maine and New Hampshire, and were to be floated down the Androscoggin River for manufacture and sale in Lewiston, Maine. The logs were detained by low water in the town of Errol, New Hampshire, where the local selectmen assessed a number of taxes upon them. The owners of the logs contested the assessments, claiming that the property was immune from taxation under both the Commerce and Import-Export Clauses, since the river served as a "public highway" for the interstate shipment of timber. The Supreme Court of New Hampshire sustained the tax, and this Court affirmed.

Writing for the Court, Mr. Justice Bradley viewed "the precise question for solution" as follows:

> "Do the owner's state of mind in relation to the goods, that is, his intent to export them, and his partial preparation to do so, exempt them from taxation?" *Id.*, at 525.

That question was answered in the negative. Recognizing that its task was to set a "point of time when State jurisdiction over the commodities of commerce begins and ends," *id.*, at 526, the Court concluded that

> "such goods do not cease to be part of the general mass of property in the State, subject, as such, to its jurisdiction, and to taxation in the usual way, *until they have been shipped, or entered with a common carrier for transportation to another State, or have been started upon such transportation in a*

> *continuous route or journey.*" *Id.*, at 527 (emphasis added).

Since the logs in *Coe* had not begun a "final movement for transportation from the State of their origin to that of their destination," *id.*, at 525, the Court held that the Constitution provided no immunity from local taxation.

The basic principle of *Coe* v. *Errol* is a simple one—the exemption from taxation in the Import-Export Clause "attaches to the export and not to the article before its exportation." *Cornell* v. *Coyne*, 192 U. S. 418, 427. This Court has adhered to that principle in the almost 90 years since *Coe* was decided, and the essential problem in cases involving the constitutional prohibition against taxation of exports has therefore been to decide whether a sufficient commencement of the process of exportation has occurred so as to immunize the article at issue from state taxation. Of necessity, the inquiry has usually been a factual one. For example, in *A. G. Spalding & Bros.* v. *Edwards*, 262 U. S. 66, this Court decided that delivery of baseballs and bats to an export carrier for shipment to Venezuela constituted a significant "step in exportation," *id.*, at 68, and exempted the goods from a federal revenue tax.[5] Similarly, in *Richfield Oil Corp.* v. *State Board of Equalization*, 329 U. S. 69, it was held that the delivery of oil into the storage tanks of a New Zealand-bound steamer "marked the commencement of the movement of the oil abroad," *id.*, at 83, making the product immune from a California sales tax.

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[5] The *Spalding* case arose under Art. I, § 9, cl. 5, of the Constitution, which provides that "No Tax or Duty shall be laid on Articles exported from any State." A long line of cases has recognized, however, that the meaning of "export" is the same under that provision as under the Import-Export Clause. See, *e. g.*, *Brown* v. *Maryland*, 12 Wheat. 419, 445; *Turpin* v. *Burgess*, 117 U. S. 504, 506; *Cornell* v. *Coyne*, 192 U. S. 418, 427–428; *Richfield Oil Corp.* v. *State Board of Equalization*, 329 U. S. 69, 83.

Yet, even if the inquiry in cases like *Spalding* and *Richfield Oil* was specifically directed at determining whether particular acts of movement toward a final destination constituted sufficient entrance into the export stream to invoke the protection of the Import-Export Clause, this Court has never lost sight of one basic principle—at least *some* such entrance is a prerequisite to the Clause's operation. That fact is well illustrated by the opinion of the Court in *Empresa Siderurgica* v. *County of Merced*, 337 U. S. 154. That case involved a California cement plant, which had been sold to a Colombian buyer. Title to the property had passed to the buyer, and a common carrier had begun to dismantle the plant and crate it for shipment to Colombia.

At a stage when 12% of the plant had been shipped out of the country, the county of Merced levied a personal property tax on the remaining 88%. This balance included about 10% of the original plant that had been dismantled and crated or prepared for shipment, but which had not yet begun its voyage to Colombia. This Court held that the tax on the 88%, including this crated portion, did not violate the Import-Export Clause. Adhering to the test of *Coe* v. *Errol*, the Court stated:

> "Under that test it is not enough that there is an intent to export, or a plan which contemplates exportation, or an integrated series of events which will end with it. . . . It is the entrance of the articles into the export stream that marks the start of the process of exportation. Then there is certainty that the goods are headed for their foreign destination and will not be diverted to domestic use. Nothing less will suffice." *Id.*, at 156–157.

Since the 88% of the cement plant had not yet begun its out-of-state journey, the Court concluded that the Cali-

fornia tax was not one upon "exports" within the meaning of the Clause.[6]

We can find little in the case before us to take it outside the ambit of the *Empresa Siderurgica* holding. At the time that the respondent's machines were assessed for taxation, they were sitting in the Dayton warehouse awaiting shipment. Title and possession were in NCR, payment had not yet been made by the putative purchasers, no export license had issued, and the machines were in the complete control of the respondent. More important, there had simply been no movement of the goods—no shipment, and no commencement of the process of exportation. Given this factual setting, it would require a sharp departure from nearly a century of precedents under the Import-Export Clause for us to conclude that the machines were "exports" and exempt from state taxation.

In an effort to avoid the clear holdings of our prior cases, NCR emphasizes the peculiar nature of the taxed machines, and contends that their nonadaptability to domestic use brought about a "certainty of export." Because of this practical absence of "diversion potential,"

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[6] In a decision rendered two weeks after *Empresa Siderurgica*, the Court made it clear that not every preliminary movement of goods toward eventual exportation was sufficient to invoke the protection of the Import-Export Clause. In *Joy Oil Co.* v. *State Tax Comm'n*, 337 U. S. 286, the question was whether an ad valorem property tax on gasoline stored in tanks at Dearborn, Michigan, for eventual export to Canada, was permissible under the Clause. The gasoline had previously been purchased by a Canadian corporation, had been certified as purchased for export, shipped by rail to Detroit under bills of lading marked "For Export to Canada," and eventually placed in the Dearborn tanks. The bulk of the gasoline remained in the tanks for over 15 months, because of an apparent shortage of shipping space by water. This Court held that, despite the initial transportation of the gasoline to Dearborn, the hiatus in the journey subjected the property to state taxation.

NCR argues that the ultimate placement of the machines into the stream of exportation is a mere formality, and that this Court should treat the crated property as already having become an export in the constitutional sense even as it sits in the Dayton warehouse.

As a practical matter, it might well be doubted that the "diversion potential" of the crated portions of the cement plant in *Empresa Siderurgica* was any greater than that present here.[7] But, even assuming, *arguendo*, the validity of NCR's arguments about the practical certainty of export here, we think it plain that the warehoused machines are not entitled to the protection of the Import-Export Clause. Mr. Justice Frankfurter put the matter succinctly in *Joy Oil Co.* v. *State Tax Comm'n*, 337 U. S. 286, 288:

> "The Export-Import Clause was meant to confer immunity from local taxation upon property being exported, not to relieve property eventually to be exported from its share of the cost of local services."

We may accept as fact the respondent's assurances that the prospect of eventual exportation here was virtually certain. "But that prospect, no matter how bright, does not start the process of exportation. On the tax date the movement to foreign shores had neither started nor been committed." *Empresa Siderurgica*, 337 U. S., at 157. Given the absence of an entrance of the respond-

[7] Indeed, it might well be contended that in this case: "There is no certainty of export. The record establishes that some machines have remained stored in the warehouse awaiting shipment for three years. The orders could be cancelled, the export license might never issue, the financing may fail to materialize, the machines could be destroyed, dismantled or sold for scrap. These machines were no different from any other mass of goods in a warehouse awaiting shipment." 35 Ohio St. 2d 166, 175, 298 N. E. 2d 559, 564–565 (O'Neill, C. J., dissenting).

ent's machines into the export stream, the immunities of the Import-Export Clause are unavailable.

It may be said that insistence upon an actual movement into the stream of export in the case at hand represents an overly wooden or mechanistic application of the *Coe* doctrine. This is an instance, however, where we believe that simplicity has its virtues. The Court recognized long ago that even if it is not an easy matter to set down a rule determining the moment in time when articles obtain the protection of the Import-Export Clause, "it is highly important, both to the shipper and to the State, that it should be clearly defined so as to avoid all ambiguity or question." *Coe*, 116 U. S., at 526. As Mr. Justice Holmes put the matter in *A. G. Spalding*, 262 U. S., at 69:

> "[W]e have to fix a point at which, in view of the purpose of the Constitution, the export must be said to begin. As elsewhere in the law there will be other points very near to it on the other side, so that if the necessity of fixing one definitely is not remembered any determination may seem arbitrary."

Our prior cases have determined that the protections of the Import-Export Clause are not available until the article at issue begins its physical entry into the stream of exportation. We find no reason to depart from that settled doctrine.

For these reasons, the judgment of the Supreme Court of Ohio is

Reversed.

CASS *v.* UNITED STATES

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 73–604. Argued April 16, 1974—Decided May 28, 1974*

Title 10 U. S. C. § 687 (a) provides for readjustment pay for an Armed Forces reservist who is involuntarily released from active duty and has completed, immediately before his release, "at least five years of continuous active duty," computed by multiplying his years of active service by two months' basic pay of his grade at the time of release, and further provides that "[f]or the purposes of this subsection— . . . (2) a part of a year that is six months or more is counted as a whole year, and a part of a year that is less than six months is disregarded . . . ." *Held:* The "rounding" provision, as is clear from the statute's legislative history, applies only in computing the amount of readjustment pay, and not in determining eligibility therefor; hence, a reservist must serve a minimum of five full years of continuous active duty before his involuntary release in order to qualify for readjustment benefits. Pp. 75–84.

483 F. 2d 220, affirmed.

WHITE, J., delivered the opinion of the Court, in which BURGER, C. J., and BRENNAN, STEWART, MARSHALL, BLACKMUN, POWELL, and REHNQUIST, JJ., joined. DOUGLAS, J., filed a dissenting statement, *post*, p. 84.

Arthur B. Hanson argued the cause for petitioner in No. 73–604. With him on the briefs was *Charles A. Smith*. *William A. Dougherty*, by appointment of the Court, 416 U. S. 934, argued the cause and filed briefs for petitioners in No. 73–5661.

William L. Patton argued the cause for respondents in both cases. With him on the brief were *Solicitor General*

*Together with No. 73–5661, *Adams et al.* v. *Secretary of the Navy et al.*, also on certiorari to the same court.

Bork, Acting Assistant Attorney General Jaffe, Robert E. Kopp, and *Anthony J. Steinmeyer.*†

MR. JUSTICE WHITE delivered the opinion of the Court.

Congress has provided in 10 U. S. C. § 687 (a) [1] that an otherwise eligible member of a reserve component of the Armed Forces, who is involuntarily released from active duty, "and who has completed, immediately before his release, at least five years of continuous active duty, is entitled to a readjustment payment computed by multiplying his years of active service . . . by two months' basic pay of the grade in which he is serving at the time of his release." It is further provided that "[f]or the purposes of this subsection— . . . (2) a part of a year that is six

†*Kevin M. Forde* filed a brief for John N. O'Meara as *amicus curiae* urging reversal in both cases.

[1] In full, 10 U. S. C. § 687 (a) provides:

"§ 687. Non-Regulars: readjustment payment upon involuntary release from active duty.

"(a) Except for members covered by subsection (b), a member of a reserve component or a member of the Army or the Air Force without component who is released from active duty involuntarily, or because he was not accepted for an additional tour of active duty for which he volunteered after he had completed a tour of active duty, and who has completed, immediately before his release, at least five years of continuous active duty, is entitled to a readjustment payment computed by multiplying his years of active service (other than in time of war or of national emergency declared by Congress after June 28, 1962), but not more than eighteen, by two months' basic pay of the grade in which he is serving at the time of his release. However, a member who is released from active duty because his performance of duty has fallen below standards prescribed by the Secretary concerned, or because his retention on active duty is not clearly consistent with the interests of national security, is entitled to a readjustment payment computed on the basis of one-half of one month's basic pay of the grade in which the member is serving at the time of his release from active duty. A person covered by this subsection may not be paid more than

months or more is counted as a whole year, and a part of a year that is less than six months is disregarded . . . ." We must decide whether the "rounding" provision set forth in § 687 (a)(2) is to be applied in determining eligibility for readjustment pay, as well as in computing the amount of readjustment pay to which an eligible reservist is entitled, so that involuntarily released reservists who have completed four years and six months or more, but less than five years, of continuous active duty prior to their release are nonetheless entitled to a readjustment payment. The Court of Appeals held that the rounding clause applied only to computation of readjustment payments, 483 F. 2d 220 (CA9 1973), contrary to the earlier decision of the Court of Claims that the rounding provision is applicable in determining eligibility for, as well as computation of, readjustment payments under § 687. *Schmid* v. *United States,* 193 Ct. Cl. 780, 436 F. 2d 987, cert. denied, 404 U. S. 951 (1971). We granted certiorari to resolve the conflict, 414 U. S. 1128 (1974), and now affirm the judgment of the Court of Appeals.

Each petitioner had served continuously for more than four years and six months, but less than five years, when notified that he would be honorably but involuntarily released from active duty in the Reserves. In No. 73–604, petitioner Cass, a captain in the Army Reserve, was in fact released from active duty before completing five

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two years' basic pay of the grade in which he is serving at the time of his release or $15,000, whichever amount is the lesser. For the purposes of this subsection—

"(1) a period of active duty is continuous if it is not interrupted by a break in service of more than 30 days;

"(2) a part of a year that is six months or more is counted as a whole year, and a part of a year that is less than six months is disregarded; and

"(3) a period for which the member concerned has received readjustment pay under another provision of law may not be included."

years of service, and when the Army denied his request for readjustment pay, he brought suit in the United States District Court for the District of Montana, which granted relief on the authority of the Court of Claims' decision in *Schmid, supra.* In No. 73–5661, petitioners Adams, Steneman, and Youngquist, captains in the Marine Corps Reserve, brought separate actions in the Central District of California, prior to their release, seeking a modification of their release orders to provide for readjustment pay. The District Court subsequently held that they were entitled to readjustment pay based on active service of more than four and one-half years.[2] The Government's appeals from the decisions of the two District Courts were consolidated, and the Court of Appeals reversed each, holding that the statute and its legislative history make clear that readjustment pay is not to be provided to reservists involuntarily released from active duty with less than five full years of continuous service.[3]

Petitioners assert to the contrary that the language of § 687 (a) unambiguously establishes that four and

[2] The District Court had earlier granted petitioners' motion for a preliminary injunction prohibiting their involuntary release without readjustment pay. As a result, these petitioners had each served more than five years on active duty by the time the decision awarding them readjustment benefits was rendered. In deciding they were entitled to readjustment pay, however, the District Court expressly disclaimed any reliance on the fact that they actually served more than five years, since they were permitted to do so only under the compulsion of the court's preliminary injunction. The injunction was dissolved as moot in the wake of the award of readjustment pay.

[3] The Court of Appeals also held that the injunction granted in favor of petitioners in No. 73–5661, see n. 2, *supra,* was improperly issued and could not be relied upon to support eligibility for readjustment benefits. 483 F. 2d 220, 222 (CA9 1973). That ruling is not challenged in this Court.

one-half years of continuous active service qualifies an involuntarily released reservist for readjustment benefits, that the legislative history of the rounding provision should therefore not be considered in resolving the issue, and that even if the legislative history is considered, it supports the construction urged by petitioners as much as that contended for by the Government. We are unpersuaded by these arguments, however.

The statute sets out both the eligibility requirements for entitlement to readjustment pay and the method of computing the amount of the applicable payment in the same sentence. Entitlement is based, in part, on the completion, immediately before the involuntary release of a reservist, of "at least five years of continuous active duty," and the payment is to be computed by multiplying the reservist's "years of active service" by two months' basic pay of the grade in which he is serving when released. Because the rounding provision expressly provides that it is to be applied for "purposes of this subsection," petitioners contend that the provision modifies the term "year" whenever that term appears in the subsection, *i. e.*, to determine whether a reservist has completed five years of service to be eligible for readjustment benefits, as well as to determine the number of years of service to use as a multiplier in computing the amount of readjustment pay owed. This is so plainly true, petitioners contend, that resort to legislative history is unnecessary and improper.[4]

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[4] Petitioners rely on cases suggesting that recourse to legislative materials is unwarranted when the meaning of statutory language is clear and unequivocal. *E. g., United States* v. *Oregon*, 366 U. S. 643, 648 (1961); *Ex parte Collett*, 337 U. S. 55, 61 (1949); *Helvering* v. *City Bank Co.*, 296 U. S. 85, 89 (1935); *United States* v. *Shreveport Grain & Elevator Co.*, 287 U. S. 77, 83 (1932). In the first two of these cases, though finding the language to be construed this

Our view is to the contrary. The rounding provision is arguably subject to the interpretation given it by petitioners, but did Congress intend that provision to override its explicit requirement of "at least" five years of service? We think the answer to that question is sufficiently doubtful to warrant our resort to extrinsic aids to determine the intent of Congress, which, of course, is the controlling consideration in resolving the issue before us.[5] Moreover,

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clear, the Court nonetheless did look at the legislative history of the statutory provisions to be interpreted.

[5] A majority of the Court of Claims in *Schmid* v. *United States*, 193 Ct. Cl. 780, 436 F. 2d 987 (1971), though they also examined the legislative history, found it clear from the language of § 687 (a) that the rounding provision should apply to both eligibility and computation determinations, whereas the Court of Appeals in these cases thought it clear that the minimum five-year eligibility clause is "not subject to the interpretation given it by the court in *Schmid*." 483 F. 2d, at 222. Obviously there is room for reasonable dispute over the construction of § 687 (a) based on the statutory language alone.

Petitioners tender other arguments, apart from that founded on the consistent use of the word "years," to demonstrate that, read in its statutory context, the rounding provision in § 687 (a) was plainly intended to establish the minimum qualifying term of service at four years, six months, but none of them overcomes the ambiguity created by the direct establishment of "at least five years" of service as a qualification for readjustment benefits. Thus, it is argued that § 687 (a) (3) excludes from the determination of both eligibility and the amount of benefits payable "a period for which the member concerned has received readjustment pay under another provision of law," and given the grammatical structure of § 687 (a), n. 1, *supra*, that the rounding rule in subsection (2) must be applied for the same purposes as the "prior period exclusion" rule of subsection (3). The Government asserts that the underlying premise that subsection (3) applies for both purposes is erroneous. As was the case with the rounding provision before codification, see text *infra*, the prior period exclusion was expressly to be applied only "[f]or the purposes of computing the amount of the readjustment payment." Act of June 28, 1962, 76 Stat. 120. Furthermore, the current Department of Defense Military Pay and Allowances Entitlements Manual § 40414 (b) (Jan. 1, 1967) still excludes such prior service only for

the Court has previously stated that "[w]hen aid to construction of the meaning of words, as used in the statute, is available, there certainly can be no 'rule of law' which

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computing the amount of readjustment pay due, not for determining entitlement. The Government suggests, therefore, that if §§ 687 (a)(2) and (3) are to be construed as applicable for the same purpose, that purpose is only for computation. Manifestly, the parties' dispute over the applicability of subsection (3) does not resolve the issue of when subsection (2) is to apply; it merely restates the problem.

Petitioners also rely on 10 U. S. C. § 6330, which expressly applies a like rounding rule both to determine eligibility for transfer to the Fleet Reserve and, thereby, for retainer pay, by enlisted members of the Navy and Marine Corps, and to compute the amount of retainer pay due. The pertinent portions of § 6330 provide as follows:

"§ 6330. Enlisted members: transfer to Fleet Reserve and Fleet Marine Corps Reserve; retainer pay.

. . . . . .

"(b) An enlisted member of the Regular Navy or the Naval Reserve who has completed 20 or more years of active service in the armed forces may, at his request, be transferred to the Fleet Reserve. An enlisted member of the Regular Marine Corps or the Marine Corps Reserve who has completed 20 or more years of active service in the armed forces may, at his request, be transferred to the Fleet Marine Corps Reserve.

"(c) Each member who is transferred to the Fleet Reserve or the Fleet Marine Corps Reserve under this section is entitled when not on active duty, to retainer pay at the rate of 2½ percent of the basic pay that he received at the time of transfer multiplied by the number of years of active service in the armed forces . . . .

"(d) For the purposes of subsections (b) and (c), a part of a year that is six months or more is counted as a whole year and a part of a year that is less than six months is disregarded. A completed minority enlistment is counted as four years of active service, and an enlistment terminated within three months before the end of the term of enlistment is counted as active service for the full term."

It is readily apparent that the rounding provision of § 687 (a)(2) contains an ambiguity not present in the more explicit language of

forbids its use, however clear the words may appear on 'superficial examination,'" *United States* v. *American Trucking Assns., Inc.*, 310 U. S. 534, 543–544 (1940); *Harrison* v. *Northern Trust Co.*, 317 U. S. 476, 479 (1943). Such aid is available in this case and we decline to ignore the clearly relevant history of § 687 (a).

Certain reservists involuntarily released from active duty are granted lump-sum readjustment pay to help them readjust to civilian life and to encourage qualified reservists to remain on active duty for extended periods. Readjustment pay was first provided by the Act of July 9, 1956, 70 Stat. 517, which conditioned entitlement on the completion immediately prior to release of "at least five years of continuous active duty." It also provided that "[f]or the purposes of computing the amount of readjustment payment (1) a part of a year that is six months or more is counted as a whole year, and a part of a year that is less than six months is disregarded . . . ." *Ibid.* As first introduced and passed by the House, however, the bill provided, as the codified version does now, that "[f]or the purposes of this subsection" the six-month rounding provision would apply. H. R. Rep. No. 1960, 84th Cong., 2d Sess., 9 (1956); 102 Cong. Rec. 10120 (June 12, 1956). It was nonetheless made clear by the debate in the House prior to passage that five years was to be the minimum eligibility requirement.[6]

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§ 6330 (d). Nor does the particular rounding provision in § 6330 indicate any legislative custom in this context that should control the construction of § 687 (a). At most, § 6330 indicates that the construction of § 687 (a) proffered by petitioners *could* fit within the structure of Title 10, not that the section *must* be so construed.

[6] The sponsor of the legislation, Representative Brooks, engaged in the following dialogue and explanation:

"Mr. BROOKS of Louisiana. . . . We started with 5 years because we estimate that the average individual who stays 5 years in the service has in view making a career of that service. After he has

The Senate, focusing on a letter from the Comptroller General to the Chairman of the Armed Services Committee suggesting that the language be clarified to ensure that five years was to be the minimum period necessary to qualify for a readjustment payment, amended the bill to reflect this more clearly,[7] *id.*, at 11333–11334

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gone a long way toward making a career of the service and when we take that opportunity away from him and turn him back to civilian life, we feel that there should be some sort of readjustment.

. . . . . .

"Mr. GROSS. The minimum, then, is 5 years; is that correct?

"Mr. BROOKS of Louisiana. That is correct. The reason for the 5 years, of course, is that a 3-year enlistment would require a reenlistment, or . . . a man who is in for 4 years will have to reenlist for an extended period. After he completes the first enlistment I think he intends to stay in the service and this encourages him to stay in the service as long as the service needs him." 102 Cong. Rec. 10118–10119 (1956).

[7] The Comptroller General's letter was contained in the Senate Report and provides in pertinent part as follows:

"Although the language of subsection (a) of the bill seems to indicate that a minimum of 5 years' continuous active duty as an officer or warrant officer is necessary to qualify for a readjustment payment, the last sentence of that subsection appears to reduce the minimum qualifying service to 4 years and 6 months. Presumably the provision authorizing the counting of 6 months or more as a whole year was intended to apply only for the purpose of computing the amount of a lump-sum payment and not the quantum of qualifying service. If so, the language should be clarified, perhaps somewhat as follows:

" 'For the purpose of computing the amount of the readjustment payment a fractional part of a year amounting to 6 months [or 183 days] or more shall be counted as a whole year and a shorter period shall be disregarded.' " S. Rep. No. 2288, 84th Cong., 2d Sess., 11 (1956).

The Report itself explains that the amended provision in the bill was designed to limit the application of the rounding formula "to years used in the computation of readjustment pay and not for years to establish the 5-year minimum of substantially continuous active duty that is required to qualify for readjustment payments." *Id.*, at 2.

(June 29, 1956), and the House readily concurred the same day in the Senate amendments to the bill as the final language of the 1956 Act, *id.*, at 11503–11504.

The Act was amended in June 1962, primarily to raise the amount of readjustment benefits paid to involuntarily released reservists to equal the amount provided as severance pay to involuntarily released regular officers,[8] but it retained the explicit language specifying the use of the rounding provision for "purposes of computing the amount of the readjustment payment," 76 Stat. 120, and there was no discussion in the congressional reports [9] suggesting any modification of this language. Less than three months later, however, the present language was adopted as part of a measure codifying "recent military laws." Act of Sept. 7, 1962, 76 Stat. 506. The committee reports accompanying the codification proposal make plain that no change in the eligibility requirements for readjustment pay was intended by the enacted change in phraseology.[10] The Senate Judiciary Committee Report explained the purpose of the proposal as follows:

> "This bill, as amended, is not intended to make any substantive change in existing law. Its purpose is to bring up to date title 10 of the United States Code, by incorporating the provisions of a number of public laws that were passed while the bill to enact title 10 into law was still pending in the Congress, and to transfer to title 10, provisions now in

[8] See H. R. Rep. No. 1007, 87th Cong., 1st Sess. (1961); S. Rep. No. 1096, 87th Cong., 1st Sess. (1961).

[9] N. 8, *supra*.

[10] The codification bill had been referred in both the House and the Senate to the Judiciary Committees, unlike the earlier substantive consideration of the bills establishing and amending the readjustment pay provisions by the Armed Services Committees of the respective chambers of Congress.

other parts of the code." S. Rep. No. 1876, 87th Cong., 2d Sess., 6 (1962).

The same limited purpose was expressed by the House Judiciary Committee, which further explained that "[s]ome changes in style and form have been made to conform the provisions to the style and form of title 10, but these changes do not affect the substance." H. R. Rep. No. 1401, 87th Cong., 2d Sess., 1 (1962).

These congressional comments, combined with the fact that no consideration of any change in eligibility standards appears in either the cited committee reports or in the proceedings leading to adoption of the codification bill by the House, 108 Cong. Rec. 4435–4441 (1962), and by the Senate, 108 Cong. Rec. 17088–17089 (1962), conclusively demonstrate that Congress did not reduce the minimum period of qualifying service for entitlement to readjustment benefits from five to four and one-half years when it substituted the words in the codified version of § 687 (a) for the unambiguous language of the prior substantive enactments. We are unpersuaded by petitioners' claim that the codified version is nevertheless to be accepted as correctly expressing the will of Congress and as a mere unexplained version of the language of prior law, see *Continental Casualty Co.* v. *United States*, 314 U. S. 527, 529–530 (1942); *United States* v. *Bowen*, 100 U. S. 508, 513 (1880). Here the meaning of the predecessor statute is clear and quite different from the meaning petitioners would ascribe to the codified law; and the revisers expressly stated that changes in language resulting from the codification were to have no substantive effect. *Fourco Glass Co.* v. *Transmirra Products Corp.*, 353 U. S. 222, 227–228 (1957); *United States* v. *Cook*, 384 U. S. 257, 260 (1966); *City of Greenwood* v. *Peacock*, 384 U. S. 808, 815–816 (1966).

The Court of Claims in the *Schmid* case, 193 Ct. Cl. 780, 436 F. 2d 987 (1971), thought that in codifying § 687 (a), Congress restored the original language of the 1956 House bill, which it knew had been interpreted by the Comptroller General as reducing the minimum eligibility requirement to four years, six months. *Id.*, at 787, 436 F. 2d, at 991. But the codification language was accompanied by no reference to the 1956 legislation or to the views then expressed by the Comptroller General.[11] What is more, it is plain that the language of the original 1956 bill was itself not intended to set the minimum eligibility period at less than five years.[12] The codification, if construed as petitioners would have it, would not represent a "return" to the original intent of Congress. It is also significant that there is no hint of any consideration of what such a change would cost or how it would affect the goals of the readjustment pay provisions, contrary to the careful attention these matters received when benefits under the readjustment pay statute were raised in 1962. As Judge Nichols commented in dissenting from the decision in *Schmid:* "In resolving ambiguity, we must allow ourselves some recognition of the existence of sheer inadvertence in the legislative process." *Id.*, at 789, 436 F. 2d, at 992. Finally, we cannot agree with the contention that a change in minimum eligibility from five to four and one-half years should not be considered a "substantive change" because once a reservist must re-enlist beyond the initial enlistment term of four years, the purpose of the readjustment benefit scheme as an inducement to extended service is satisfied. Not only is the selection of the particular minimum term of eligibility a peculiarly legislative task dependent upon substantive judgment, but the very fact that such a

[11] See n. 7, *supra*.

[12] See n. 6, *supra*.

change involves a substantially greater expenditure of funds places this sort of revision into the substantive realm.

We thus conclude that the rounding provision of § 687 (a)(2) is applicable only in the determination of how much readjustment pay an otherwise qualified reservist is authorized, and that such a reservist must serve a minimum of five full years of continuous active duty before he is involuntarily released in order to be eligible for readjustment benefits. The judgment of the Court of Appeals is

Affirmed.

MR. JUSTICE DOUGLAS, agreeing with the Court of Claims in *Schmid* v. *United States,* 193 Ct. Cl. 780, 436 F. 2d 987, would reverse the judgment of the Court of Appeals.

BELLIS *v.* UNITED STATES

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 73–190. Argued February 25, 1974—Decided May 28, 1974

Fifth Amendment privilege against self-incrimination *held* not available to member of dissolved law partnership who had been subpoenaed by a grand jury to produce the partnership's financial books and records, since the partnership, though small, had an institutional identity and petitioner held the records in a representative, not a personal, capacity. The privilege is "limited to its historic function of protecting only the natural individual from compulsory incrimination through his own testimony or personal records." *United States* v. *White*, 322 U. S. 694, 701. Pp. 87–101. 483 F. 2d 961, affirmed.

MARSHALL, J., delivered the opinion of the Court, in which BURGER, C. J., and BRENNAN, STEWART, WHITE, BLACKMUN, POWELL, and REHNQUIST, JJ., joined. DOUGLAS, J., filed a dissenting opinion, *post*, p. 101.

Leonard Sarner argued the cause for petitioner. With him on the briefs was *Louis Lipschitz.*

Deputy Solicitor General Wallace argued the cause for the United States. With him on the brief were *Solicitor General Bork, Assistant Attorney General Crampton, Stuart A. Smith,* and *Meyer Rothwacks.*

MR. JUSTICE MARSHALL delivered the opinion of the Court.

The question presented in this case is whether a partner in a small law firm may invoke his personal privilege against self-incrimination to justify his refusal to comply with a subpoena requiring production of the partnership's financial records.

Until 1969, petitioner Isadore Bellis was the senior partner in Bellis, Kolsby & Wolf, a law firm in Philadelphia. The firm was formed in 1955 or 1956. There were three partners in the firm, the three individuals listed in the firm name. In addition, the firm had six employees: two other attorneys who were associated with the firm, one part-time; three secretaries; and a receptionist. Petitioner's secretary doubled as the partnership's bookkeeper, under the direction of petitioner and the firm's independent accountant. The firm's financial records were therefore maintained in petitioner's office during his tenure at the firm.

Bellis left the firm in late 1969 to join another law firm. The partnership was dissolved, although it is apparently still in the process of winding up its affairs. Kolsby and Wolf continued in practice together as a new partnership, at the same premises. Bellis moved to new offices, leaving the former partnership's financial records with Kolsby and Wolf, where they remained for more than three years. In February or March 1973, however, shortly before issuance of the subpoena in this case, petitioner's secretary, acting at the direction of petitioner or his attorney, removed the records from the old premises and brought them to Bellis' new office.

On May 1, 1973, Bellis was served with a subpoena directing him to appear and testify before a federal grand jury and to bring with him "all partnership records currently in your possession for the partnership of Bellis, Kolsby & Wolf for the years 1968 and 1969." App. 6. Petitioner appeared on May 9, but refused to produce the records, claiming, *inter alia*, his Fifth Amendment privilege, against compulsory self-incrimination. After a hearing before the District Court on May 9 and 10, the court held that petitioner's personal privilege did not extend to the partnership's financial books and records, and ordered

their production by May 16.[1] When petitioner reappeared before the grand jury on that date and again refused to produce the subpoenaed records, the District Court held him in civil contempt, and released him on his own recognizance pending an expedited appeal.

On July 9, 1973, the Court of Appeals affirmed in a *per curiam* opinion. *In re Grand Jury Investigation*, 483 F. 2d 961 (CA3 1973). Relying on this Court's decision in *United States* v. *White*, 322 U. S. 694 (1944), the Court of Appeals stated that "the privilege has always been regarded as personal in the sense that it applies only to an individual's words or personal papers" and thus held that the privilege against self-incrimination did not apply to "records of an entity such as a partnership which has a recognizable juridical existence apart from its members." 483 F. 2d, at 962. After MR. JUSTICE WHITE had stayed the mandate of the Court of Appeals on August 1, we granted certiorari, 414 U. S. 907 (1973), to consider this interpretation of the Fifth Amendment privilege and the applicability of our *White* decision in the circumstances of this case. We affirm.

It has long been established, of course, that the Fifth Amendment privilege against compulsory self-incrimination protects an individual from compelled production of his personal papers and effects as well as compelled oral testimony. In *Boyd* v. *United States*, 116 U. S. 616 (1886), we held that "any forcible and compulsory extortion of a man's own testimony or of his private papers to be used as evidence to convict him of crime" would violate the Fifth Amendment privilege. *Id.*, at 630; see also *id.*, at 633–635; *Wilson* v. *United States*, 221 U. S. 361, 377 (1911). The privilege applies to the business records of

[1] Although the wording of the subpoena was arguably broad enough to encompass them, the District Court expressly excluded any client files from the scope of its order.

the sole proprietor or sole practitioner as well as to personal documents containing more intimate information about the individual's private life. *Boyd* v. *United States, supra; Couch* v. *United States,* 409 U. S. 322 (1973); *Hill* v. *Philpott,* 445 F. 2d 144 (CA7), cert. denied, 404 U. S. 991 (1971); *Stuart* v. *United States,* 416 F. 2d 459, 462 (CA5 1969). As the Court explained in *United States* v. *White, supra,* at 698, "[t]he constitutional privilege against self-incrimination . . . is designed to prevent the use of legal process to force from the lips of the accused individual the evidence necessary to convict him or to force him to produce and authenticate any personal documents or effects that might incriminate him." See also *Curcio* v. *United States,* 354 U. S. 118, 125 (1957); *Couch* v. *United States, supra,* at 330–331.

On the other hand, an equally long line of cases has established that an individual cannot rely upon the privilege to avoid producing the records of a collective entity which are in his possession in a representative capacity, even if these records might incriminate him personally. This doctrine was first announced in a series of cases dealing with corporate records. In *Wilson* v. *United States, supra,* the Court held that an officer of a corporation could not claim his privilege against compulsory self-incrimination to justify a refusal to produce the corporate books and records in response to a grand jury subpoena *duces tecum* directed to the corporation. A companion case, *Dreier* v. *United States,* 221 U. S. 394 (1911), held that the same result followed when the subpoena requiring production of the corporate books was directed to the individual corporate officer. In *Wheeler* v. *United States,* 226 U. S. 478 (1913), the Court held that no Fifth Amendment privilege could be claimed with respect to corporate records even though the corporation had previously been dissolved. And

Grant v. *United States*, 227 U. S. 74 (1913), applied this principle to the records of a dissolved corporation where the records were in the possession of the individual who had been the corporation's sole shareholder.

To some extent, these decisions were based upon the particular incidents of the corporate form, the Court observing that a corporation has limited powers granted to it by the State in its charter, and is subject to the retained "visitorial power" of the State to investigate its activities. See, *e. g.*, *Wilson* v. *United States*, *supra*, at 382–385. But any thought that the principle formulated in these decisions was limited to corporate records was put to rest in *United States* v. *White*, *supra*. In *White*, we held that an officer of an unincorporated association, a labor union, could not claim his privilege against compulsory self-incrimination to justify his refusal to produce the union's records pursuant to a grand jury subpoena. *White* announced the general rule that the privilege could not be employed by an individual to avoid production of the records of an organization, which he holds in a representative capacity as custodian on behalf of the group. 322 U. S., at 699–700. Relying on *White*, we have since upheld compelled production of the records of a variety of organizations over individuals' claims of Fifth Amendment privilege. See, *e. g.*, *United States* v. *Fleischman*, 339 U. S. 349, 357–358 (1950) (Joint Anti-Fascist Refugee Committee); *Rogers* v. *United States*, 340 U. S. 367, 371–372 (1951) (Communist Party of Denver); *McPhaul* v. *United States*, 364 U. S. 372, 380 (1960) (Civil Rights Congress). See also *Curcio* v. *United States*, *supra* (local labor union).

These decisions reflect the Court's consistent view that the privilege against compulsory self-incrimination should be "limited to its historic function of protecting only the natural individual from compulsory incrimination through

his own testimony or personal records." *United States* v. *White, supra,* at 701. *White* is only one of the many cases to emphasize that the Fifth Amendment privilege is a purely personal one, most recent among them being the Court's decision last Term in *Couch* v. *United States,* 409 U. S., at 327–328. Relying on this fundamental policy limiting the scope of the privilege, the Court in *White* held that "the papers and effects which the privilege protects must be the private property of the person claiming the privilege, or at least in his possession in a purely personal capacity." 322 U. S., at 699. Mr. Justice Murphy reasoned that "individuals, when acting as representatives of a collective group, cannot be said to be exercising their personal rights and duties nor to be entitled to their purely personal privileges. Rather they assume the rights, duties and privileges of the artificial entity or association of which they are agents or officers and they are bound by its obligations." *Ibid.*

Since no artificial organization may utilize the personal privilege against compulsory self-incrimination, the Court found that it follows that an individual acting in his official capacity on behalf of the organization may likewise not take advantage of his personal privilege. In view of the inescapable fact that an artificial entity can only act to produce its records through its individual officers or agents, recognition of the individual's claim of privilege with respect to the financial records of the organization would substantially undermine the unchallenged rule that the organization itself is not entitled to claim any Fifth Amendment privilege, and largely frustrate legitimate governmental regulation of such organizations. Mr. Justice Murphy put it well:

> "The scope and nature of the economic activities of incorporated and unincorporated organizations and their representatives demand that the constitu-

> tional power of the federal and state governments to regulate those activities be correspondingly effective. The greater portion of evidence of wrongdoing by an organization or its representatives is usually to be found in the official records and documents of that organization. Were the cloak of the privilege to be thrown around these impersonal records and documents, effective enforcement of many federal and state laws would be impossible. The framers of the constitutional guarantee against compulsory self-disclosure, who were interested primarily in protecting individual civil liberties, cannot be said to have intended the privilege to be available to protect economic or other interests of such organizations so as to nullify appropriate governmental regulations." *Id.*, at 700 (citations omitted).

See also *Wilson* v. *United States, supra,* at 384–385.

The Court's decisions holding the privilege inapplicable to the records of a collective entity also reflect a second, though obviously interrelated, policy underlying the privilege, the protection of an individual's right to a " 'private enclave where he may lead a private life.' " *Murphy* v. *Waterfront Comm'n,* 378 U. S. 52, 55 (1964). We have recognized that the Fifth Amendment "respects a private inner sanctum of individual feeling and thought"—an inner sanctum which necessarily includes an individual's papers and effects to the extent that the privilege bars their compulsory production and authentication—and "proscribes state intrusion to extract self-condemnation." *Couch* v. *United States, supra,* at 327. See also *Griswold* v. *Connecticut,* 381 U. S. 479, 484 (1965). Protection of individual privacy was the major theme running through the Court's decision in *Boyd,* see, *e. g.,* 116 U. S., at 630, and it was on this basis that the Court in *Wilson* distinguished the corporate records involved in

that case from the private papers at issue in *Boyd*. See 221 U. S., at 377, 380.

But a substantial claim of privacy or confidentiality cannot often be maintained with respect to the financial records of an organized collective entity. Control of such records is generally strictly regulated by statute or by the rules and regulations of the organization, and access to the records is generally guaranteed to others in the organization. In such circumstances, the custodian of the organization's records lacks the control over their content and location and the right to keep them from the view of others which would be characteristic of a claim of privacy and confidentiality. Mr. Justice Murphy recognized the significance of this in *White;* he pointed out that organizational records "[u]sually, if not always, . . . are open to inspection by the members," that "this right may be enforced on appropriate occasions by available legal procedures," and that "[t]hey therefore embody no element of personal privacy." 322 U. S., at 699–700. And here lies the modern-day relevance of the visitorial powers doctrine relied upon by the Court in *Wilson* and the other cases dealing with corporate records; the Court's holding that no privilege exists "where, by virtue of their character and the rules of law applicable to them, the books and papers are held subject to examination by the [state]," 221 U. S., at 382, can easily be understood as a recognition that corporate records do not contain the requisite element of privacy or confidentiality essential for the privilege to attach.

The analysis of the Court in *White*, of course, only makes sense in the context of what the Court described as "organized, institutional activity." 322 U. S., at 701. This analysis presupposes the existence of an organization which is recognized as an independent entity apart from its individual members. The group must be relatively

well organized and structured, and not merely a loose, informal association of individuals. It must maintain a distinct set of organizational records, and recognize rights in its members of control and access to them. And the records subpoenaed must in fact be organizational records held in a representative capacity. In other words, it must be fair to say that the records demanded are the records of the organization rather than those of the individual under *White*.

The Court in *White* had little difficulty in concluding that the demand for production of the official records of a labor union, whether national or local, in the custody of an officer of the union, met these tests. See *id.*, at 701–703. The Court observed that a union's existence in fact, if not in law, was "as perpetual as that of any corporation," *id.*, at 701, that the union operated under formal constitutions, rules, and bylaws, and that it engaged in a broad scope of activities in which it was recognized as an independent entity. The Court also pointed out that the official union books and records were distinct from the personal books and records of its members, that the union restricted the permissible uses of these records, and that it recognized its members' rights to inspect them. Although the Court was aware that the individual members might legally hold title to the union records, the Court characterized this interest as a "nominal" rather than a significant personal interest in them.

We think it is similarly clear that partnerships may and frequently do represent organized institutional activity so as to preclude any claim of Fifth Amendment privilege with respect to the partnership's financial records. Some of the most powerful private institutions in the Nation are conducted in the partnership form. Wall Street law firms and stock brokerage firms provide significant examples. These are often large, impersonal,

highly structured enterprises of essentially perpetual duration. The personal interest of any individual partner in the financial records of a firm of this scope is obviously highly attenuated. It is inconceivable that a brokerage house with offices from coast to coast handling millions of dollars of investment transactions annually should be entitled to immunize its records from SEC scrutiny solely because it operates as a partnership rather than in the corporate form. Although none of the reported cases has involved a partnership of quite this magnitude, it is hardly surprising that all of the courts of appeals which have addressed the question have concluded that *White*'s analysis requires rejection of any claim of privilege in the financial records of a large business enterprise conducted in the partnership form. *In re Mal Brothers Contracting Co.*, 444 F. 2d 615 (CA3), cert. denied, 404 U. S. 857 (1971); *United States* v. *Silverstein*, 314 F. 2d 789 (CA2), cert. denied, 374 U. S. 807 (1963); *United States* v. *Wernes*, 157 F. 2d 797, 800 (CA7 1946). See also *United States* v. *Onassis*, 125 F. Supp. 190, 205–210 (DC 1954). Even those lower courts which have held the privilege applicable in the context of a smaller partnership have frequently acknowledged that no absolute exclusion of the partnership form from the *White* rule generally applicable to unincorporated associations is warranted. See, *e. g.*, *United States* v. *Cogan*, 257 F. Supp. 170, 173–174 (SDNY 1966); *In re Subpoena Duces Tecum*, 81 F. Supp. 418, 421 (ND Cal. 1948).

In this case, however, we are required to explore the outer limits of the analysis of the Court in *White*. Petitioner argues that in view of the modest size of the partnership involved here, it is unrealistic to consider the firm as an entity independent of its three partners; rather, he claims, the law firm embodies little more than the per-

sonal legal practice of the individual partners. Moreover, petitioner argues that he has a substantial and direct ownership interest in the partnership records, and does not hold them in a representative capacity.[2]

Despite the force of these arguments, we conclude that the lower courts properly applied the *White* rule in the circumstances of this case. While small, the partnership here did have an established institutional identity independent of its individual partners. This was not an informal association or a temporary arrangement for the undertaking of a few projects of short-lived duration. Rather, the partnership represented a formal institutional arrangement organized for the continuing conduct of the firm's legal practice. The partnership was in

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[2] Petitioner also argues that we have already decided the issue presented in this case, and held that the Fifth Amendment privilege could be claimed with respect to partnership records, in the *Boyd* case. It is true that the notice to produce involved in *Boyd* was in fact issued to E. A. Boyd & Sons, a partnership. See 116 U. S. 616, 619. However, at this early stage in the development of our Fifth Amendment jurisprudence, the potential significance of this fact was not observed by either the parties or the Court. The parties treated the invoice at issue as a private business record, and the contention that it might be a partnership record held in a representative capacity, and thus not within the scope of the privilege, was not raised. The Court therefore decided the case on the premise that it involved the "compulsory production of a man's private papers." *Id.*, at 622. It was only after *Boyd* had held that the Fifth Amendment privilege applied to the compelled production of documents that the question of the extension of this principle to the records of artificial entities arose. We do not believe that the Court in *Boyd* can be said to have decided the issue presented today. See *United States* v. *Onassis*, 125 F. Supp. 190, 208 (DC 1954).

In any event, the Court in *Boyd* did not inquire into the nature of the Boyd & Sons partnership or the capacity in which the invoice was acquired or held. Absent such an inquiry, we are unable to determine how our decision today would affect the result of *Boyd* on the facts of that case. See *infra*, at 101.

existence for nearly 15 years prior to its voluntary dissolution.[3] Although it may not have had a formal constitution or bylaws to govern its internal affairs, state partnership law imposed on the firm a certain organizational structure in the absence of any contrary agreement by the partners;[4] for example, it guaranteed to each of the partners the equal right to participate in the management and control of the firm, Pa. Stat. Ann., Tit. 59, § 51 (e) (1964), and prescribed that majority rule governed the conduct of the firm's business, § 51 (h).[5] The firm maintained a bank account in the partnership name, had stationery using the firm name on its letter-

[3] Petitioner properly concedes that the dissolution of the partnership does not afford him any greater claim to the privilege than he would have if the firm were still active. Brief for Petitioner 31 n. 12. Under Pennsylvania law, dissolution of the partnership does not terminate the entity; rather it continues until the winding up of the partnership affairs is completed, Pa. Stat. Ann., Tit. 59, § 92 (1964), which has not yet occurred in this case. Moreover, this Court's decisions have made clear that the dissolution of a corporation does not give the custodian of the corporate records any greater claim to the Fifth Amendment privilege. *Wheeler* v. *United States*, 226 U. S. 478, 489–490 (1913); *Grant* v. *United States*, 227 U. S. 74, 80 (1913). We see no reason why the same should not be true of the records of a partnership after its dissolution.

[4] The record in this case is quite sketchy, and it is unclear whether the partnership here had adopted a formal partnership agreement. Petitioner apparently had a 45% interest in the profits of the firm, which suggests that there may have been such an agreement. However, there is no indication that any such agreement made any material change in the provisions of state law regarding the management and control of the firm or the rights of the other partners with respect to the firm's financial records. In any event, the existence of a formal partnership agreement would merely reinforce our conclusion that the partnership is properly regarded as an independent entity with a relatively formal organization.

[5] Pennsylvania has adopted the provisions of the Uniform Partnership Act, which is also in force in 40 other States and the District of Columbia.

head, and, in general, held itself out to third parties as an entity with an independent institutional identity. It employed six persons in addition to its partners, including two other attorneys who practiced law on behalf of the firm, rather than as individuals on their own behalf. It filed separate partnership returns for federal tax purposes, as required by § 6031 of the Internal Revenue Code, 26 U. S. C. § 6031.[6] State law permitted the firm to be sued, Pa. Rule Civ. Proc. 2128, and to hold title to property, Pa. Stat. Ann., Tit. 59, § 13 (3), in the partnership name, and generally regarded the partnership as a distinct entity for numerous other purposes.[7]

Equally important, we believe it is fair to say that petitioner is holding the subpoenaed partnership records in a representative capacity.[8] The documents which

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[6] As we observed only last Term, a "partnership is regarded as an independently recognizable entity apart from the aggregate of its partners" for a number of purposes under the Internal Revenue Code. *United States* v. *Basye*, 410 U. S. 441, 448 (1973).

[7] Of course, state and federal law do not treat partnerships as distinct entities for all purposes. But we think that partnerships bear enough of the indicia of legal entities to be treated as such for the purpose of our analysis of the Fifth Amendment issue presented in this case. The fact that partnerships are not viewed solely as entities is immaterial for this purpose. See *United States* v. *White*, 322 U. S. 694, 697 (1944).

[8] Petitioner argues that as a partner in the firm, he has an interest in the firm's records as co-owner which entitles him to claim the privilege against self-incrimination. But such an ownership interest exists in a partnership of any size. Moreover, the same ownership interest is presented in the case of a labor union or other unincorporated association. The Court's decision in *White* clearly established that the mere existence of such an ownership interest is not in itself sufficient to establish a claim of privilege. See also *Wheeler* v. *United States*, 226 U. S., at 489–490; *Grant* v. *United States*, 227 U. S., at 79–80.

MR. JUSTICE DOUGLAS argues in dissent that the partnership as an entity is not under investigation by the grand jury, rather that peti-

petitioner has been ordered to produce are merely the financial books and records of the partnership.[9] These reflect the receipts and disbursements of the entire firm, including income generated by and salaries paid to the employees of the firm, and the financial transactions of the other partners. Petitioner holds these records subject to the rights granted to the other partners by state partnership law. Petitioner has no direct ownership interest in the records; rather, under state law, they are partnership property, and petitioner's interest in partnership property is a derivative interest subject to significant limitations. See *Ellis* v. *Ellis*, 415 Pa. 412, 415–416, 203 A. 2d 547, 549–550 (1964). Petitioner has no right to use this property for other than partnership purposes without the consent of the other partners. Pa. Stat. Ann., Tit. 59, § 72 (2)(a). Petitioner is of course accountable to the partnership as

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tioner is the target of the inquiry. Assuming that this is true, it does not give petitioner any greater claim to the privilege. We have rejected this same argument in holding that the privilege cannot be maintained with respect to corporate records, in words fully applicable here:

"Nor is it an answer to say that in the present case the inquiry before the grand jury was not directed against the corporation itself. The appellant had no greater right to withhold the books by reason of the fact that the corporation was not charged with criminal abuses. That, if the corporation had been so charged, he would have been compelled to submit the books to inspection, despite the consequences to himself, sufficiently shows the absence of any basis for a claim on his part of personal privilege as to them; it could not depend upon the question whether or not another was accused." *Wilson* v. *United States*, 221 U. S. 361, 385 (1911).

[9] Significantly, the District Court here excluded any client files from the scope of its order. See n. 1, *supra*. A different case might be presented if petitioner had been ordered to produce files containing work which he had personally performed on behalf of his clients, even if these files might for some purposes be viewed as those of the partnership.

a fiduciary, § 54 (1), and his possession of the firm's financial records is especially subject to his fiduciary obligations to the other partners. Indeed, Pennsylvania law specifically provides that "every partner shall at all times have access to and may inspect and copy any of [the partnership books]." § 52.[10] To facilitate this right of access, petitioner was required to keep these financial books and records at the firm's principal place of business, at least during the active life of the partnership. *Ibid.* The other partners in the firm were—and still are—entitled to enforce these rights through legal action by demanding production of the records in a suit for a formal accounting. § 55.[11]

It should be noted also that petitioner was content to leave these records with the other members of the partnership at their principal place of business for more than three years after he left the firm. Moreover, the Government contends that the other partners in the firm had agreed to turn the records over to the grand jury before discovering that petitioner had removed them from their offices, and that they made an unavailing demand upon petitioner to return the records. Whether or not petitioner's present possession of these records is an unlawful infringement of the rights of the other partners, this provides additional support for our conclusion that it is the organizational character of the records and the representative aspect of petitioner's present possession of

[10] The Court in *White*, in pointing out that union records were generally open to inspection by the members, 322 U. S., at 699–700, relied upon *Guthrie* v. *Harkness*, 199 U. S. 148, 153 (1905), where the Court observed that "the members of an ordinary partnership [have the same right] to examine their company's books."

[11] To implement these rights, Pennsylvania law permits any partner to bring suit against the partnership, and the partnership to sue any partner. Pa. Rule Civ. Proc. 2129.

them which predominates over his belatedly discovered personal interest in them.

Petitioner relies heavily on language in the Court's opinion in *White* which suggests that the "test" for determining the applicability of the Fifth Amendment privilege in this area is whether the organization "has a character so impersonal in the scope of its membership and activities that it cannot be said to embody or represent the purely private or personal interests of its constituents, but rather to embody their common or group interests only." 322 U. S., at 701. We must admit our agreement with the Solicitor General's observation that "it is difficult to know precisely what situations the formulation in *White* was intended to include within the protection of the privilege." Brief for United States 21. The Court in *White*, after stating its test, did not really apply it, nor has any of the subsequent decisions of this Court. On its face, the test is not particularly helpful in the broad range of cases, including this one, where the organization embodies neither "purely . . . personal interests" nor "group interests only," but rather some combination of the two.

In any event, we do not believe that the Court's formulation in *White* can be reduced to a simple proposition based solely upon the size of the organization. It is well settled that no privilege can be claimed by the custodian of corporate records, regardless of how small the corporation may be. *Grant* v. *United States*, 227 U. S. 74 (1913); *Fineberg* v. *United States*, 393 F. 2d 417, 420 (CA9 1968); *Hair Industry, Ltd.* v. *United States*, 340 F. 2d 510 (CA2 1965); cf. *George Campbell Painting Corp.* v. *Reid*, 392 U. S. 286 (1968). Every State has now adopted laws permitting incorporation of professional associations, and increasing numbers of lawyers, doctors, and other professionals are choosing to conduct their business af-

fairs in the corporate form rather than the more traditional partnership. Whether corporation or partnership, many of these firms will be independent entities whose financial records are held by a member of the firm in a representative capacity. In these circumstances, the applicability of the privilege should not turn on an insubstantial difference in the form of the business enterprise. See *In re Grand Jury Subpoena Duces Tecum,* 358 F. Supp. 661, 668 (Md. 1973).

This might be a different case if it involved a small family partnership, see *United States* v. *Slutsky,* 352 F. Supp. 1105 (SDNY 1972); *In re Subpoena Duces Tecum,* 81 F. Supp., at 421, or, as the Solicitor General suggests, Brief for United States 22–23, if there were some other pre-existing relationship of confidentiality among the partners. But in the circumstances of this case, petitioner's possession of the partnership's financial records in what can be fairly said to be a representative capacity compels our holding that his personal privilege against compulsory self-incrimination is inapplicable.

Affirmed.

MR. JUSTICE DOUGLAS, dissenting.

Bellis, the petitioner, was formerly one of three partners in a small law firm; the partnership was dissolved, and Bellis currently has lawful possession of the firm's records. The grand jury has subpoenaed those records apparently for the purpose of a tax investigation directed against Bellis personally.* He refused to comply, claiming his Fifth Amendment privilege against self-incrimination, but the Court today holds that privilege not available to Bellis. I think the case is clearly controlled by *Boyd* v. *United States,* 116 U. S. 616, and thus I dissent.

*See App. 24; Tr. of Oral Arg. 8.

In *Boyd* the Court held that the Fifth Amendment privilege extends to the production of papers personally held as well as to the compulsion of testimony. "[W]e have been unable to perceive that the seizure of a man's private books and papers to be used in evidence against him is substantially different from compelling him to be a witness against himself." 116 U. S., at 633. In purporting to distinguish this case from *Boyd*, the Court relies on *United States* v. *White*, 322 U. S. 694, involving a subpoena directed to a union, not to any individual, for the production of official union documents. *White* in turn relied on cases holding that the privilege against self-incrimination is a personal one, which can be claimed only by natural persons, and not by corporations. *Id.*, at 699, citing *Hale* v. *Henkel*, 201 U. S. 43; *Wilson* v. *United States*, 221 U. S. 361; *Essgee Co.* v. *United States*, 262 U. S. 151. "[T]he papers and effects which the privilege protects must be the private property of the person claiming the privilege, or at least in his possession in a purely personal capacity." *White, supra*, at 699.

In extending these corporation cases to the union papers involved in *White*, we stressed that the test is not a mechanical one, but "whether one can fairly say under all the circumstances that a particular type of organization has a character so impersonal in the scope of its membership and activities that it cannot be said to embody or represent the purely private or personal interests of its constituents, but rather to embody their common or group interests only." *Id.*, at 701. In finding that the union was such an impersonal organization, the court pointed out that the union's existence is not dependent upon the life of any member, that it separately owns property apart from any of its members or officers, that its treasury exists apart from the personal funds of its members, and

that without special authorization no member can bind the union. *Id.*, at 701–702. None of these factors is present here in this small three-man law firm. Pennsylvania, as have most States, has adopted the Uniform Partnership Act, Pa. Stat. Ann., Tit. 59, § 1. This partnership would dissolve automatically upon the death of any member, § 93, and any partner can bind the entire partnership in the conduct of its affairs, § 31. No new member can join without unanimous consent of the partners, § 51 (g). In Pennsylvania as in many States a partnership can hold and sell property in its own name, Pa. Stat. Ann., Tit. 15, § 12773; Pa. Stat. Ann., Tit. 59, § 13, but each partner individually is a co-owner of that property, § 72, and in many substantive legal respects the ownership by the partnership is different in kind from ordinary ownership of property. Any legal liabilities arising from property owned by the partnership, of course, extend to the partners individually if the common partnership assets are exhausted, § 37.

I would treat a partnership as *Boyd* treated it. This partnership is as different from a labor union or the run of corporations as black is from white. By the Court's opinion a man and wife who form a law partnership or medical partnership or dental partnership are treated as some kind of new "entity" so as to expand the power of government into an area from which the Fifth Amendment excludes it. The nature of a partnership is not even a federal question; it turns on its creator, the State. Pennsylvania tells us by its Supreme Court that a Pennsylvania partnership "is treated as an aggregate of individuals and not as a separate entity." *Tax Review Board* v. *Shapiro Co.*, 409 Pa. 253, 260, 185 A. 2d 529, 533. For federal income tax purposes the partnership pays no tax, it is merely the conduit through which income passes

to the taxpaying partners. Internal Revenue Code §§ 701, 702, 26 U. S. C. §§ 701, 702.

The majority refers to large law firms or brokerage houses as examples of partnerships which take on the characteristics of independent entities in the manner of corporations. None that I know could properly be considered an organization with "a character so impersonal in the scope of its membership and activities that it cannot be said to embody or represent the purely private or personal interests of its constituents," *White, supra,* at 701. That certainly is not the case presented here. At times the law may treat unlikes as if they were alike; but it surpasses understanding when a two- or three-man partnership is treated the same as members or officers of a giant corporation or a giant union. See *United States* v. *Cogan,* 257 F. Supp. 170 (SDNY 1966) (Frankel, J.). This small three-man firm had no real existence apart from the three individual attorneys.

All this only goes to demonstrate that Bellis was not holding the records involved here as a representative of some separate, impersonal entity with no rights under the Fifth Amendment. The records he holds are his own, in both a legal and a practical sense. Nor could the grand jury investigation result in any finding of tax liability by the partnership as a separate entity, for the partnership has no tax obligations other than the filing of informational forms that aid in determining the liabilities of the individual partners. It was only Bellis individually, or his two former partners, against whom the investigation could have been directed. If Bellis had been conducting a solo practice, his claim of privilege could not be overridden, as the Government here necessarily conceded. I am unable to perceive why he should be held to have forfeited that constitutional right by joining with two others in a partnership.

Indeed, the significance of the distinction is so obscure that the Court did not even see fit to notice it in *Boyd* itself, where in fact the subpoena was directed at a partnership and not an individual. As the Government here concedes, Brief for United States 14 n. 10, both parties and the Court assumed in *Boyd* that the partnership documents there sought were personal property.

"This command of the Fifth Amendment . . . registers an important advance in the development of our liberty—'one of the great landmarks in man's struggle to make himself civilized.' Time has not shown that protection from the evils against which this safeguard was directed is needless or unwarranted. This constitutional protection must not be interpreted in a hostile or niggardly spirit." *Ullmann* v. *United States,* 350 U. S. 422, 426. But it is the niggardly view which prevails today, with the Court effectively overruling *Boyd* in holding that the Government can compel an individual to produce his private records to aid a Government investigation of him. That is a view I cannot join.

COOPER STEVEDORING CO., INC. *v.* FRITZ KOPKE, INC., ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 73-726. Argued April 15-16, 1974—Decided May 28, 1974

A longshoreman was injured when, while loading a vessel owned by one respondent and time chartered to the other (hereinafter collectively the Vessel), he stepped into a concealed gap between crates which had previously been loaded by petitioner. The longshoreman then sued the Vessel, which filed a third-party complaint against petitioner. The District Court found both the Vessel and petitioner negligent, and divided the liability equally. On petitioner's appeal, the Court of Appeals affirmed. *Held:* The award of contribution between joint tortfeasors in a noncollision maritime case was proper under the circumstances. On the facts, no countervailing considerations detract from the well-established maritime rule allowing contribution between joint tortfeasors, since where the longshoreman, not being an employee of petitioner, could have proceeded against either the Vessel or petitioner, or both, and thus could have elected to make petitioner bear its share of the damages, there is no reason why the Vessel should not be accorded the same right. *Halcyon Lines* v. *Haenn Ship Corp.*, 342 U. S. 282, distinguished. Pp. 110-115.

479 F. 2d 1041, affirmed.

MARSHALL, J., delivered the opinion of the Court, in which all Members joined except STEWART, J., who took no part in the decision of the case.

Joseph D. Cheavens argued the cause and filed a brief for petitioner.

Bruce Dixie Smith argued the cause and filed a brief for respondents.

MR. JUSTICE MARSHALL delivered the opinion of the Court.

This case concerns the extent to which contribution between joint tortfeasors may be obtained in a maritime

action for personal injuries. The S. S. *Karina,* a vessel owned and operated by respondent Fritz Kopke, Inc., and under time charter to respondent Alcoa Steamship Co., was loaded at Mobile, Alabama, with palletized crates of cargo by petitioner Cooper Stevedoring Co. The vessel then proceeded to the Port of Houston where longshoremen employed by Mid-Gulf Stevedores, Inc., began to load sacked cargo. The Houston longshoremen had to use the top of the tier of crates loaded by Cooper as a floor on which to walk and stow the Houston cargo. One of these longshoremen, Troy Sessions, injured his back when he stepped into a gap between the crates which had been concealed by a large piece of corrugated paper.

Sessions brought suit in the District Court against Kopke and Alcoa (hereinafter collectively the Vessel) seeking to recover damages for his injuries.[1] The Vessel filed a third-party complaint against Cooper alleging that if Sessions was injured by any unseaworthy condition of the vessel or as the result of negligence other than his own, such condition or negligence resulted from the conduct of Cooper and its employees. The Vessel also filed a similar third-party complaint against Mid-Gulf.

Prior to trial, Mid-Gulf and the Vessel apparently entered into an agreement under which Mid-Gulf would indemnify the Vessel against any recovery which Sessions might obtain. Pursuant to this agreement, Mid-Gulf was dismissed as a third-party defendant and Mid-

[1] This suit was commenced prior to the enactment of the 1972 amendments to the Longshoremen's and Harbor Workers' Compensation Act, 33 U. S. C. §§ 901–944 (1970 ed., Supp. II), and all parties agree that the amendments are therefore not applicable. Accordingly we need not decide whether Sessions' suit against the Vessel or the Vessel's third-party complaints against Cooper or Mid-Gulf could be brought under the Act, as amended. See § 905 (b).

Gulf's attorneys were substituted as counsel for the Vessel.[2]

The case then went to trial, after which the District Court, which sat without a jury, orally announced its findings of fact and conclusions of law. The court found that the Vessel's failure either to make adequate arrangements to assure that the stow would not move and leave spaces in the course of its trip from Mobile to Houston or to put some type of dunnage on top of the stow had resulted in an unsafe place to work and unseaworthy condition. The court found that Cooper was also negligent in not stowing the crates in a manner in which longshoremen at subsequent ports could safely work on top of them. Finding it difficult from the evidence to "evaluate exactly the responsibility between the shipowner on the one hand and Cooper on the other," the District Court divided the liability equally between the Vessel and Cooper.[3] Judg-

[2] Petitioner suggests that the Vessel cannot recover contribution because it has already been fully indemnified for the judgment under its agreement with Mid-Gulf. See W. Prosser, Law of Torts §§ 48–49 (4th ed. 1971). But this suggestion rests on a faulty construction of the agreement between the Vessel and Mid-Gulf. The latter agreed to indemnify the Vessel only to the extent necessary after trial of the lawsuit, and the assumption of the parties was that Mid-Gulf would step into the Vessel's shoes both to defend the suit brought by Sessions and to prosecute the third-party complaint against Cooper.

[3] Since the District Court concluded that the only apportionment of fault it could reach on the evidence in this case was an equal division, we have no occasion in this case to determine whether contribution in cases such as this should be based on an equal division of damages or should be relatively apportioned in accordance with the degree of fault of the parties. Cf. *The Max Morris*, 137 U. S. 1, 15 (1890). See also *Jacob* v. *New York City*, 315 U. S. 752 (1942); *Socony-Vacuum Oil Co.* v. *Smith*, 305 U. S. 424 (1939); *The Arizona* v. *Anelich*, 298 U. S. 110 (1936). See generally Staring, Contribution and Division of Damages in Admiralty and Maritime Cases, 45 Calif. L. Rev. 304, 340–344 (1957).

ment was entered allowing Sessions to recover $38,679.90 from the Vessel and allowing the Vessel to recover $19,339.95 from Cooper.

Cooper appealed,[4] asserting that the District Court's award of contribution in a noncollision maritime case was in direct conflict with this Court's decisions in *Halcyon Lines* v. *Haenn Ship Corp.*, 342 U. S. 282 (1952), and *Atlantic Coast Line R. Co.* v. *Erie Lackawanna R. Co.*, 406 U. S. 340 (1972). The Court of Appeals rejected this contention, relying on prior decisions of the Fifth and Second Circuits to the effect that the apparent prohibition against contribution in noncollision maritime cases announced in *Halcyon* and *Atlantic* was inapplicable where the joint tortfeasor against whom contribution is sought is not immune from tort liability by statute. See *Horton & Horton, Inc.* v. *T/S J. E. Dyer*, 428 F. 2d 1131 (CA5 1970), cert. denied, 400 U. S. 993 (1971); *Watz* v. *Zapata Off-Shore Co.*, 431 F. 2d 100 (CA5 1970); *In re Seaboard Shipping Corp.*, 449 F. 2d 132 (CA2 1971), cert. denied, 406 U. S. 949 (1972). The Court of Appeals found this principle applicable here since Sessions, in addition to suing the Vessel, could have proceeded directly against Cooper as the latter was not his employer

[4] The Vessel also cross-appealed, contending that the District Court should have allowed it full indemnity from Cooper. The Court of Appeals rejected this argument, relying on the District Court's finding that the Vessel's "conduct precluded its full recovery on the indemnity claim because it failed to fulfill its primary responsibility under its arrangement with Cooper to assure that some type of dunnage was placed on top of the cargo." 479 F. 2d 1041, 1042. Cf. *Weyerhaeuser S. S. Co.* v. *Nacirema Operating Co.*, 355 U. S. 563, 567 (1958). The Vessel did not file a petition for a writ of certiorari to seek review of this aspect of the Court of Appeals' judgment, and we therefore lack jurisdiction to consider its contention that it is entitled to recover full indemnity on the basis of *Ryan Stevedoring Co.* v. *Pan-Atlantic S. S. Corp.*, 350 U. S. 124 (1956).

and, therefore, not shielded by the limited liability of the Longshoremen's and Harbor Workers' Compensation Act, 33 U. S. C. § 905. 479 F. 2d 1041 (CA5 1973). We granted certiorari to consider this question, 414 U. S. 1127 (1974), and now affirm.

Where two vessels collide due to the fault of each, an admiralty doctrine of ancient lineage provides that the mutual wrongdoers shall share equally the damages sustained by each. In *The North Star,* 106 U. S. 17 (1882), Mr. Justice Bradley traced the doctrine back to the Laws of Oléron which date from the 12th century, and its roots no doubt go much deeper. Even though the common law of torts rejected a right of contribution among joint tortfeasors, the principle of division of damages in admiralty has, over the years, been liberally extended by this Court in directions deemed just and proper. In one line of cases, for example, the Court expanded the doctrine to encompass not only damage to the vessels involved in a collision, but personal injuries and property damage caused innocent third parties as well. See, *e. g., The Washington,* 9 Wall. 513 (1870); *The Alabama,* 92 U. S. 695 (1876); *The Atlas,* 93 U. S. 302 (1876); *The Chattahoochee,* 173 U. S. 540 (1899). See generally *The Max Morris,* 137 U. S. 1, 8–11 (1890). In other cases, the Court has recognized the application of the rule of divided damages in circumstances not involving a collision between two vessels, as where a ship strikes a pier due to the fault of both the shipowner and the pier owner, see *Atlee* v. *Packet Co.,* 21 Wall. 389 (1875), or where a vessel goes aground in a canal due to the negligence of both the shipowner and the canal company, see *White Oak Transp. Co.* v. *Boston, Cape Cod & New York Canal Co.,* 258 U. S. 341 (1922). See also *The Max Morris, supra,* at 13–14. Indeed, it is fair to say that application of the rule of division of damages between

joint tortfeasors in admiralty cases has been as broad as its underlying rationales. The interests of safety dictate that where two parties "are both in fault, they should bear the damage equally, to make them more careful." *The Alabama, supra,* at 697. And a "more equal distribution of justice" can best be achieved by ameliorating the common-law rule against contribution which permits a plaintiff to force one of two wrongdoers to bear the entire loss, though the other may have been equally or more to blame. See *The Max Morris, supra,* at 14.

Despite the occasional breadth of its dictum, our opinion in *Halcyon* should be read with this historical backdrop in mind. Viewed from this perspective, and taking into account the factual circumstances presented in that case, we think *Halcyon* stands for a more limited rule than the absolute bar against contribution in noncollision cases urged upon us by petitioner.[5]

In *Halcyon,* a ship repair employee was injured while making repairs on Halcyon's ship. He sued Halcyon for damages, alleging negligence and unseaworthiness. Since the employee was covered by the Longshoremen's and Harbor Workers' Compensation Act, 33 U. S. C. §§ 901–950, he was prohibited from suing his employer Haenn. Nevertheless Halcyon impleaded Haenn as a joint tort-

[5] The lower courts have generally not read *Halcyon* as petitioner suggests, and have continued to recognize a right of contribution in noncollision maritime cases. See, *e. g., Crain Bros., Inc.* v. *Wieman & Ward Co.,* 223 F. 2d 256 (CA3 1955); *Moran Towing Corp.* v. *M. A. Gammino Constr. Co.,* 409 F. 2d 917 (CA1 1969); *Coca Cola Co., Tenco Div.* v. *S. S. Norholt,* 333 F. Supp. 946 (SDNY 1971); *Dow Chemical Co.* v. *Tug Thomas Allen,* 349 F. Supp. 1354 (ED La. 1972); *Bilkay Holding Corp.* v. *Consolidated Iron & Metal Co.,* 330 F. Supp. 1313 (SDNY 1971); *American Independent Oil Co.* v. *M. S. Alkaid,* 289 F. Supp. 329 (SDNY 1967); *Cities Service Refining Corp.* v. *National Bulk Carriers, Inc.,* 146 F. Supp. 418 (SD Tex. 1956).

feasor seeking contribution for the judgment recovered by the employee. We granted certiorari in *Halcyon* to resolve a conflict which had arisen among the circuits as to whether a shipowner could recover contribution in these circumstances. See 342 U. S., at 283–284, and n. 3. One court had held that the employer's limitation of liability *vis-à-vis* its employee under the Harbor Workers' Act barred contribution. See *American Mutual Liability Insurance Co.* v. *Matthews*, 182 F. 2d 322 (CA2 1950). Another Circuit had held that the Act did not bar contribution, see *United States* v. *Rothschild Int'l Stevedoring Co.*, 183 F. 2d 181 (CA9 1950), and yet a third Circuit, in the case reviewed in *Halcyon*, had permitted contribution but limited it to the amount which the injured employee could have compelled the employer to pay had he elected to claim compensation under the Act. 187 F. 2d 403 (CA3 1951).

Before this Court, both parties in *Halcyon* agreed that "limiting an employer's liability for contribution to those uncertain amounts recoverable under the Harbor Workers' Act is impractical and undesirable." 342 U. S., at 284. The Court also took cognizance of the apparent trade-off in the Act between the employer's limitation of liability and the abrogation, in favor of the employee, of common-law doctrines of contributory negligence and assumption of risk. *Id.*, at 285-286. Confronted with the possibility that any workable rule of contribution might be inconsistent with the balance struck by Congress in the Harbor Workers' Act between the interests of carriers, employers, employees, and their respective insurers, we refrained from allowing contribution in the circumstances of that case.

These factors underlying our decision in *Halcyon* still have much force. Indeed, the 1972 amendments to the Harbor Workers' Act re-emphasize Congress' determina-

tion that as between an employer and its injured employee, the right to compensation under the Act should be the employee's exclusive remedy.[6] But whatever weight these factors were properly accorded in the factual circumstances presented in *Halcyon*, they have no application here. Unlike the injured worker in *Halcyon*, Sessions was not an employee of Cooper and could have proceeded against either the Vessel or Cooper or both of them to recover full damages for his injury. Had Sessions done so, either or both of the defendants could have been held responsible for all or part of the damages. Since Sessions could have elected to make Cooper bear its share of the damages caused by its negligence, we see no reason why the Vessel should not be accorded the same right. On the facts of this case, then, no countervailing considerations detract from the well-established maritime rule allowing contribution between joint tortfeasors.

Our brief *per curiam* opinion in *Atlantic Coast Line R. Co.* v. *Erie Lackawanna R. Co.*, 406 U. S. 340 (1972), is fully consistent with this view. In that case a yard brakeman, employed by Erie, brought suit for injuries

[6] Under the 1972 amendments, an employee injured on a vessel can bring an action against the vessel for negligence, but the vessel's liability will not be based upon the warranty of seaworthiness or breach thereof. And where the vessel has been held liable for negligence "the employer shall not be liable to the vessel for such damages directly or indirectly and any agreements or warranties to the contrary shall be void." 33 U. S. C. § 905 (b) (1970 ed., Supp. II). The intent and effect of this amendment were to overrule this Court's decisions in *Seas Shipping Co.* v. *Sieracki*, 328 U. S. 85 (1946), and *Ryan Stevedoring Co.* v. *Pan-Atlantic S. S. Corp.*, 350 U. S. 124 (1956), insofar as they made an employer circuitously liable for injuries to its employee, by allowing the employee to maintain an action for unseaworthiness against the vessel and allowing the vessel to maintain an action for indemnity against the employer. See H. R. Rep. No. 92–1441, pp. 4–8 (1972); S. Rep. No. 92–1125, pp. 8–12 (1972).

sustained while working on a boxcar owned by another railroad, Atlantic, while the boxcar was being transported on a carfloat barge owned by Erie. The accident was allegedly due to a defective footboard and handbrake of the boxcar and the plaintiff sued Atlantic for its negligence in supplying defective equipment. Atlantic sought contribution from Erie on the ground that its negligence was also a factor in causing the injury. The District Court denied contribution, relying on *Halcyon*. The Court of Appeals affirmed and we granted certiorari because it initially appeared that the decision was inconsistent with the Courts of Appeals' decisions in *Horton*, *Watz*, and *Seaboard*, *supra*, which had allowed contribution, notwithstanding *Halcyon*, in situations where the party against whom contribution was sought was not entitled to the limitation-of-liability protections of the Harbor Workers' Act. After oral argument, however, it appeared that the case was factually indistinguishable from *Halcyon*. Erie, against whom contribution was sought, was the plaintiff's employer, and in *Pennsylvania R. Co.* v. *O'Rourke*, 344 U. S. 334 (1953), we recognized that a railroad employee injured while working on a freight car situated on a carfloat in navigable waters was subject exclusively to the Harbor Workers' Act. Erie was therefore entitled to the limitation-of-liability protections of the Harbor Workers' Act, just like the employer in *Halcyon*.

Petitioner argues, however, that this protection was ephemeral in *Atlantic* since, under *Jackson* v. *Lykes Bros. S. S. Co.*, 386 U. S. 731 (1967), the injured employee in *Atlantic* could have sued Erie, the shipowner-employer, for unseaworthiness of the vessel. See also *Reed* v. *The Yaka*, 373 U. S. 410 (1963). But the fact that Erie may have been subject to a suit based on unseaworthiness for damages caused by defective box-

car appliances, compare *The Osceola,* 189 U. S. 158, 175 (1903), with *Gutierrez* v. *Waterman S. S. Corp.,* 373 U. S. 206, 213 (1963), did not make it a joint tortfeasor subject to a contribution claim. Contribution rests upon a finding of concurrent fault. Erie's liability, if any, for unseaworthiness of its vessel would have been a strict liability not based upon fault. In other words, even if Erie were negligent, its injured employee was entitled to claim compensation from it under the Harbor Workers' Act, and Erie was accordingly entitled to the protective mantle of the Act's limitation-of-liability provisions. And to the extent Erie was not negligent but nevertheless subject to a suit on a seaworthiness theory, Erie was not a joint tortfeasor against whom contribution could be sought. See *Simpson Timber Co.* v. *Parks,* 390 F. 2d 353 (CA9), cert. denied, 393 U. S. 858 (1968).

In sum, our opinion in *Atlantic* was not intended to answer the question posed by the present case, as its failure to discuss *Horton, Watz,* and *Seaboard* indicates. Rather, *Atlantic* proves only that our decision in *Halcyon* was, and still is, good law on its facts.

Affirmed.

MR. JUSTICE STEWART took no part in the decision of this case.

F. D. RICH CO., INC., ET AL. *v.* UNITED STATES FOR THE USE OF INDUSTRIAL LUMBER CO., INC.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 72-1382. Argued January 9, 1974—Decided May 28, 1974

Petitioner F. D. Rich Co., the prime contractor on a federal housing project in California, had two separate contracts for the project with Cerpac Co., one contract being for Cerpac to select, modify, detail, and install all custom millwork and the other being for Cerpac to supply all exterior plywood. Cerpac in turn ordered the lumber called for under the plywood contract from respondent. When Rich needed plywood for another project in South Carolina, one of the shipments called for by respondent's contract with Cerpac was diverted to South Carolina. When Cerpac defaulted on its payments to respondent for the plywood, including the South Carolina shipment, respondent gave notice to Rich and its surety of a Miller Act claim and thereafter brought suit in the Federal District Court for the Eastern District of California where the California project was located. Finding that Cerpac was a "subcontractor" within the meaning of the Miller Act, rather than merely a materialman, that hence respondent could assert a Miller Act claim against Rich, and that venue for suit on the South Carolina as well as the California shipments properly lay, under 40 U. S. C. § 270b (b), in the Eastern District of California, the District Court granted judgment for respondent for the amount due on the unpaid invoices, but denied its claim for attorneys' fees. The Court of Appeals affirmed in large part, but held that attorneys' fees should be awarded respondent. *Held:*

1. Based on the substantiality and importance of its relationship with the prime contractor, *MacEvoy Co.* v. *United States ex rel. Tomkins Co.*, 322 U. S. 102, Cerpac was clearly a subcontractor for Miller Act purposes, considering not just its plywood contract but also its custom millwork contract on the California project. Moreover, Cerpac and Rich had closely interrelated management and financial structures, and their relationship on the California

project was the same as on many other similar projects; hence it would have been easy for Rich to secure itself from loss as a result of Cerpac's default. Pp. 121–124.

2. Venue for suit on the South Carolina shipment properly lay in the Eastern District of California, since there was clearly a sufficient nexus for satisfaction of § 270b (b)'s venue requirements. The contract between Cerpac and respondent was executed in California, all materials thereunder to be delivered to the California worksite. California remained the site for performance of the original contract despite the diversion of one shipment to South Carolina. There was no showing of prejudice resulting from the case's being heard in California and considerations of judicial economy and convenience supported venue in the court where all of respondent's claims could be adjudicated in a single proceeding. Pp. 124–126.

3. Attorneys' fees were improperly awarded respondent. Pp. 126–131.

(a) The Court of Appeals erred in construing the Miller Act to require the award by reference to the "public policy" of the State in which suit was brought, since the Act provides a federal cause of action and there is no evidence of any congressional intent to incorporate state law to govern such an important element of Miller Act litigation as liability for attorneys' fees. Pp. 127–128.

(b) The provision of the Miller Act in 40 U. S. C. § 270b (a) that claimants should recover the "sums justly due," does not require the award of attorneys' fees on the asserted ground that without such fee shifting, claimants would not be fully compensated. To hold otherwise would amount to judicial obviation of the "American Rule" that attorneys' fees are not ordinarily recoverable in federal litigation in the absence of a statute or contract providing therefor, in the context of everyday commercial litigation, where the policies which underlie the limited judicially created departures from the rule are inapplicable. Pp. 128–131.

473 F. 2d 720, affirmed in part and reversed in part.

MARSHALL, J., delivered the opinion of the Court, in which BURGER, C. J., and BRENNAN, STEWART, WHITE, BLACKMUN, POWELL, and REHNQUIST, JJ., joined. DOUGLAS, J., filed an opinion dissenting in part, *post*, p. 131.

Lawrence Gochberg argued the cause for petitioners. With him on the brief were *Otto Rohwer* and *Ronald N. Paul.*

Dennis S. Harlowe argued the cause for respondent. With him on the brief was *E. M. Murray.*

MR. JUSTICE MARSHALL delivered the opinion of the Court.

The Miller Act, 49 Stat. 793, as amended, 80 Stat. 1139, 40 U. S. C. § 270a *et seq.*, requires a Government contractor [1] to post a surety bond "for the protection of all persons supplying labor and material in the prosecution of the work provided for" in the contract. The Act further provides that any person who has so furnished labor or material and who has not been paid in full within 90 days after the last labor was performed or material supplied may bring suit on the payment bond for the unpaid balance. 40 U. S. C. § 270b (a). This case presents several unresolved issues of importance in the administration of the Act.

I

Between 1961 and 1968, petitioner F. D. Rich Co. was the prime contractor on numerous federal housing projects. During the years 1963–1966, much if not all of the plywood and millwork for these projects was supplied by Cerpac Co. The Cerpac organization was closely intertwined with Rich. The principals of Rich held a substantial voting interest in Cerpac stock, supplied a major share of its working capital, and were thoroughly familiar with its operations and financial condition.

On October 18, 1965, Rich contracted with the United States to build 337 family housing units at Beale Air

[1] Government contracts of less than $2,000 in value are excepted from the statute's coverage.

Force Base, California. Rich's Miller Act surety, petitioner Transamerica Insurance Co., posted the payment bond required by the Act. Rich then awarded Cerpac two contracts on the project, one to select, modify, detail, and install all custom millwork, and one merely to supply all standard exterior plywood, each contract incorporating by reference terms of the prime contract. A similar arrangement was employed by Rich and Cerpac on other projects during this period.

On February 22, 1966, Cerpac placed a single order with respondent Industrial Lumber Co. for all exterior plywood required under its plywood contract for the Beale project. Industrial is a broker, purchasing wood products and materials for resale. It acknowledged the complete Cerpac order, purchased the plywood from its own suppliers and arranged for deliveries at the Beale site to begin on March 10, 1966. Each shipment was receipted as it arrived on the site by a Rich representative.

Shortly after Industrial's shipments began, Rich informed Cerpac that more plywood was needed for another Government project being constructed in Charleston, South Carolina, for which Cerpac had also contracted to supply Rich with all exterior plywood. Rich and Cerpac decided to divert some of the Beale lumber to Charleston. Accordingly, Industrial was advised to supply a shipment of the plywood called for under its Beale contract with Cerpac to the South Carolina site. Industrial arranged for the wood to be shipped by one of its suppliers to a railhead near Charleston. The shipment diverted to South Carolina was one of 22 called for by Industrial's Beale Contract.[2] There were several subsequent shipments to the California site under that contract.

[2] Shipments under the contract were invoiced by the truckload. The South Carolina shipment involved two such truckloads, while the other 21 shipments were each of only one truckload of lumber.

During April and May 1966, Cerpac fell behind in its payments to Industrial, and on July 13, 1966, having not received payment on invoices for nine separate shipments, Industrial gave notice to Rich and its surety of a Miller Act claim and thereafter brought the instant action in the Federal District Court for the Eastern District of California.[3] The District Court recognized that under our decision in *MacEvoy Co.* v. *United States ex rel. Tomkins Co.*, 322 U. S. 102 (1944), Rich's liability turned on whether Cerpac was a "subcontractor" within the meaning of the Act or merely a materialman. The District Court found that Cerpac was a subcontractor; hence Industrial, as its supplier, could assert a Miller Act claim against Rich, the prime contractor on the project. The District Court also rejected Rich's claim that venue for suit on the South Carolina shipment was improper in the Eastern District of California. Accordingly, the District Court granted judgment for Industrial, holding Cerpac [4] and Rich as primary obligees and Transamerica on its bond, jointly and severally liable for the amount of all nine unpaid invoices, $31,402.97, including the amount

[3] When Cerpac fell behind in its payments, Industrial indicated it would not deliver the final two truckloads of wood to the Beale project until it received satisfactory assurances of payment. Rich agreed to pay Industrial directly for the last two shipments, with Cerpac to receive its customary profit as a commission from Industrial. The last two shipments were made on May 18 and June 23, 1966, invoices being payable in full 30 days thereafter. The shipments were invoiced directly to Rich with copies to Cerpac, the invoices showing the shipments as being under the original "Beale 647" contract between Industrial and Cerpac. Rich nonetheless refused to pay the full invoice price of the two final shipments. Rich has since conceded its obligation to pay Industrial's claim for these two shipments, so there is no longer any controversy in regard to the amounts due on those invoices.

[4] Cerpac subsequently filed for discharge in bankruptcy and is no longer a party.

due on the shipment diverted to South Carolina. The District Court, however, denied Industrial's claim for attorneys' fees.

Both Rich and Industrial appealed. The Court of Appeals affirmed the judgment against Rich in large part.[5] On Industrial's cross-appeal, the court reversed, holding that attorneys' fees should have been awarded to Industrial as a successful plaintiff under the Miller Act, and remanded to the District Court for consideration of the amount of attorneys' fees to be awarded. 473 F. 2d 720 (CA9 1973). We granted certiorari.[6] 414 U. S. 816 (1973). We affirm the judgment below to the extent it holds that Cerpac was a "subcontractor" for Miller Act purposes and that there was proper venue, but reverse as to the propriety of an award of attorneys' fees.

II

Section 270a (a)(2) of the Miller Act establishes the general requirement of a payment bond to protect those who supply labor or materials to a contractor on a federal

[5] All invoices under the Beale contract between Industrial and Cerpac were payable within 30 days with interest at an annual rate of eight percent after the due date. The District Court awarded Industrial seven percent interest on all "unliquidated claims." The Court of Appeals, however, ruled that the amounts due under the terms of the contract were liquidated damages and should bear an interest rate of eight percent.

The District Court had also given judgment against Transamerica on its bond for the shipment which was sent to the South Carolina site. The Court of Appeals held that judgment should not have been rendered against Transamerica for material not delivered to the project for which it served as surety.

[6] Petitioners also raise issues in their brief concerning the timeliness of the Miller Act notice and the amount of prejudgment interest awarded respondent. Those issues were not raised in the petition for certiorari, hence are not properly before the Court. See, *e. g.*, *Namet* v. *United States*, 373 U. S. 179, 190 (1963); Rule 23.1 (c) of the Rules of this Court.

project. Ordinarily, a supplier of labor or materials on a private construction project can secure a mechanic's lien against the improved property under state law. But a lien cannot attach to Government property, see *Illinois Surety Co.* v. *John Davis Co.*, 244 U. S. 376, 380 (1917), so suppliers on Government projects are deprived of their usual security interest. The Miller Act was intended to provide an alternative remedy to protect the rights of these suppliers.

The rights afforded by the Act are limited, however, by the proviso of § 270b (a). In *MacEvoy Co.* v. *United States ex rel. Tomkins Co., supra,* this Court construed § 270b (a) to limit the protection of a Miller Act bond to those who had a contractual agreement with the prime contractor or with a "subcontractor." Those in more remote relationships, including persons supplying labor or material to a mere materialman, were found not to be protected. 322 U. S., at 109–111. Industrial was a supplier of materials to Cerpac. Thus, if Cerpac were a subcontractor for purposes of the Act, Industrial, having given the required statutory notice, could assert a Miller Act claim against Rich, the prime contractor. But, if Cerpac were merely a materialman, Industrial could not assert its Miller Act claim since it would be merely a supplier of materials to a materialman, a relationship found too remote in *MacEvoy* to enjoy the protections of the Act.

Petitioners assert that the courts below erred in finding Cerpac a subcontractor. Cerpac's role under the plywood contract alone was that of a broker receiving standard lumber supplied by Industrial and, in turn, supplying it without modification to Rich. Petitioners argue that the court should not have looked beyond the plywood contract to determine Cerpac's status under the Act.

In *MacEvoy, supra,* the Court adopted a functional rather than a technical definition for the term subcontractor, as used in the proviso. The Court noted that a subcontractor is "one who performs for and takes from the prime contractor a specific part of the labor or material requirements of the original contract . . . ." 322 U. S., at 109. The Court went on to explain the reason for the exclusion from the protections of the Act of suppliers of mere materialmen as opposed to those who supply subcontractors:

> "The relatively few subcontractors who perform part of the original contract represent in a sense the prime contractor and are well known to him. *It is easy for the prime contractor to secure himself against loss by requiring the subcontractors to give security by bond, or otherwise, for the payment of those who contract directly with the subcontractors.* . . . But this method of protection is generally inadequate to cope with remote and undeterminable liabilities incurred by an ordinary materialman, who may be a manufacturer, a wholesaler or a retailer." *Id.,* at 110. (Emphasis added.)

The Court of Appeals properly construed our holding in *MacEvoy* to establish as a test for whether one is a subcontractor, the substantiality and importance of his relationship with the prime contractor.[7] It is the substantiality of the relationship which will usually determine whether the prime contractor can protect himself, since he can easily require bond security or other protection from those few "subcontractors" with whom he has a

[7] See, *e. g., Aetna Casualty & Surety Co.* v. *United States ex rel. Gibson Steel Co.,* 382 F. 2d 615, 617 (CA5 1967); *Basich Bros. Construction Co.* v. *United States ex rel. Turner,* 159 F. 2d 182 (CA9 1946); cf. *United States ex rel. Bryant* v. *Lembke Construction Co.,* 370 F. 2d 293 (CA10 1966).

substantial relationship in the performance of the contract.

Measured against that test, Cerpac was clearly a subcontractor for the purposes of the Act. The Miller Act is "highly remedial [and] entitled to a liberal construction and application in order properly to effectuate the Congressional intent to protect those whose labor and materials go into public projects." *MacEvoy, supra,* at 107. It is consistent with that intent to look at the total relationship between Cerpac and Rich, not just the contract to supply exterior plywood, to determine whether Cerpac was a subcontractor.[8] Cerpac had not only agreed to supply standard plywood but also had a separate contract to select, modify, detail, and install all custom millwork for the Beale project. Cerpac, in effect, took over a substantial part of the prime contract itself. Moreover, the management and financial structures of the two companies were closely interrelated and their relationship on the Beale project was the same as on many other similar Government projects during the same period. Cerpac was, as the Court of Appeals observed, "in a special, integral, almost symbiotic relationship [with] Rich." 473 F. 2d, at 724. It would have been easy for Rich to secure itself from loss as a result of a default by Cerpac.

III

We also agree with the courts below that venue under the Miller Act for suit on the shipment diverted to South Carolina properly lay in the Eastern District of California. The Act provides:

> "Every suit instituted under this section shall be brought in . . . the United States District Court for

[8] *Travelers Indemnity Co.* v. *United States ex rel. Western Steel Co.,* 362 F. 2d 896, 898 (CA9 1966); *United States ex rel. Wellman Engineering Co.* v. *MSI Corp.,* 350 F. 2d 285, 286 (CA2 1965).

> any district in which the contract was to be performed and executed and not elsewhere . . . ." 40 U. S. C. § 270b (b).

Petitioners argue that this provision bars a district court in California [9] from adjudicating respondent's claims arising from the shipments of plywood delivered in South Carolina. But § 270b (b) is merely a venue requirement [10] and there was clearly a sufficient nexus for its satisfaction. The "Beale 647" contract between Cerpac and Industrial was executed in California, all of the materials described therein to be delivered to a worksite in that State. Although one of the 22 shipments made pursuant to the contract was later diverted to South Carolina for petitioner Rich's convenience, the site for performance of the original contract remained the same for Miller Act purposes.[11] Several shipments to the Beale site were made after the South Carolina shipment. Moreover, petitioners have pointed to no prejudice resulting from the case's being heard in the California court and considerations of judicial economy and convenience clearly support venue in the

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[9] Beale Air Force Base is located in the jurisdiction of the Federal District Court for the Eastern District of California, hence respondent brought suit on the Beale contract in that court.

[10] *United States ex rel. Capolino Sons, Inc.* v. *Electronic & Missile Facilities, Inc.*, 364 F. 2d 705 (CA2 1966); see cases collected, *id.*, at 707.

[11] The Court of Appeals reversed the judgment against Transamerica, on its bond, as to the shipment of wood diverted to South Carolina, because a Miller Act surety is liable only for material supplied for use on the bonded project. But, a decision on the ultimate question of the surety's liability involves different considerations from the questions of whether venue for suit on the bond is proper. Petitioner Rich's liability for the amount due on the South Carolina shipment was based on a pendent claim, the substance of which was not challenged in this Court or in the Court of Appeals.

District Court where all of respondent's claims arising from the "Beale 647" contract could be adjudicated in a single proceeding.

IV

We turn now to the question of whether attorneys' fees were properly awarded respondent as a successful Miller Act plaintiff. The so-called "American Rule" governing the award of attorneys' fees in litigation in the federal courts is that attorneys' fees "are not ordinarily recoverable in the absence of a statute or enforceable contract providing therefor." *Fleischmann Distilling Corp.* v. *Maier Brewing Co.*, 386 U. S. 714, 717 (1967). There was no contractual provision concerning attorneys' fees in this case. Nor does the Miller Act explicitly provide for an award of attorneys' fees to a successful plaintiff. But the Court of Appeals construed the Act to require an award of attorneys' fees where the "public policy" of the State in which suit was brought allows for the award of fees in similar contexts. The court reasoned that the Act provides remedies " 'in lieu of the lien upon land and buildings customary where property is owned by private persons' . . . . The federal remedy was intended to substitute for the unavailable state remedy of the lien. Therefore, if state [law] allows a supplier on private projects to recover such fees, there is no reason for a different rule to apply to federal projects . . . ." [12] Looking to California law, the Court of Appeals found an award of attorneys' fees proper because Cal. Govt. Code § 4207 (1966) allowed for the recovery of at-

[12] 473 F. 2d 720, 727 (1973). The same analysis has been accepted in several other cases; see *Transamerica Insurance Co.* v. *Red Top Metal, Inc.*, 384 F. 2d 752 (CA5 1967); *United States ex rel. White Masonry, Inc.* v. *F. D. Rich Co.*, 434 F. 2d 855, 859 (CA9 1970); *Arnold* v. *United States ex rel. Bowman Mechanical Contractors, Inc.*, 470 F. 2d 243, 245 (CA10 1972).

torneys' fees in state actions on the bonds of contractors for state and municipal public works projects.[13]

We think the Court of Appeals erred in its construction of the statute. The Miller Act provides a federal cause of action, and the scope of the remedy as well as the substance of the rights created thereby is a matter of federal not state law. Neither respondent nor the court below offers any evidence of congressional intent to incorporate state law to govern such an important element of Miller Act litigation as liability for attorneys' fees. Many federal contracts involve construction in more than one State, and often, as here, the parties to Miller Act litigation have little or no contact, other than the contract itself, with the State in which the federal project is located. The reasonable expectations of such potential litigants are better served by a rule of uniform national application.

A uniform rule also avoids many of the pitfalls which have already manifested themselves in using state law referents. For example, California law does not provide for awards of attorneys' fees in suits arising from private construction projects. And, a California court had held that the state statute providing for awards of attorneys' fees in suits on the bonds of state and municipal public works contractors is inapplicable to construction projects of the United States.[14] The Court of Appeals nonethe-

[13] After the decision in the District Court, but prior to the Court of Appeals' opinion, Cal. Govt. Code § 4207 (1966) was replaced, and the effective provisions transferred to Cal. Civ. Code § 3250 (Supp. 1974), by an act of the California Legislature, dated August 31, 1969, that took effect on January 1, 1971. Given our reasoning, however, the revision in language of the applicable California law is of no relevance to the result reached herein.

[14] *B. C. Richter Contracting Co.* v. *Continental Casualty Co.*, 230 Cal. App. 2d 491, 41 Cal. Rptr. 98 (1964) (construing the former law, see n. 13, *supra*).

less held that since federal law controls Miller Act recoveries, it was free to look to "state policy" rather than state law and proceeded to find an award of attorneys' fees appropriate. Although the court below premised its decision on the theory that a Miller Act remedy is afforded " 'in lieu of the lien upon land and buildings customary where property is owned by private persons,' " it gave respondent more protection than California law affords litigants involved in disputes arising from private construction projects who are not entitled to an award of attorneys' fees. We think it better to extricate the federal courts from the morass of trying to divine a "state policy" as to the award of attorneys' fees in suits on construction bonds.

Finally, the Court of Appeals intimates that in providing that Miller Act claimants should recover the "sums justly due," 40 U. S. C. § 270b (a), Congress must have intended to provide for the award of attorneys' fees because without such fee shifting, Miller Act claimants would not be fully compensated—the claimant's recovery would always be diminished by the cost of his legal representation. This argument merely restates one of the oft-repeated criticisms of the American Rule.[15] Almost a half century ago, the Massachusetts Judicial Council pleaded for reform, asking, "On what principle of justice can a plaintiff wrongfully run down on a public highway recover

[15] The American Rule has come under repeated criticism over the years. See generally Ehrenzweig, Reimbursement of Counsel Fees and the Great Society, 54 Calif. L. Rev. 792 (1966); Kuenzel, The Attorney's Fee: Why Not a Cost of Litigation?, 49 Iowa L. Rev. 75 (1963); McLaughlin, The Recovery of Attorney's Fees: A New Method of Financing Legal Services, 40 Ford. L. Rev. 761 (1972); McCormick, Counsel Fees and Other Expenses of Litigation as an Element of Damages, 15 Minn. L. Rev. 619 (1931); Stoebuck, Counsel Fees Included in Costs: A Logical Development, 38 U. Colo. L. Rev. 202 (1966); Note, Attorney's Fees: Where Shall the Ultimate Burden Lie?, 20 Vand. L. Rev. 1216 (1967).

his doctor's bill but not his lawyer's bill?" [16] We recognize that there is some force to the argument that a party who must bear the costs of his attorneys' fees out of his recovery is not made whole. But there are countervailing considerations as well. We have observed that "one should not be penalized for merely defending or prosecuting a lawsuit, and that the poor might be unjustly discouraged from instituting actions to vindicate their rights if the penalty for losing included the fees of their opponents' counsel." *Fleischmann Distilling Corp.* v. *Maier Brewing Co.*, 386 U. S. 714, 718 (1967). Moreover, "the time, expense, and difficulties of proof inherent in litigating the question of what constitutes reasonable attorney's fees," *ibid.*, has given us pause, even though courts have regularly engaged in that endeavor in the many contexts where fee shifting is mandated by statute, policy, or contract. Finally, there is the possibility of a threat being posed to the principle of independent advocacy by having the earnings of the attorney flow from the pen of the judge before whom he argues.

The American Rule has not served, however, as an absolute bar to the shifting of attorneys' fees even in the absence of statute or contract. The federal judiciary has recognized several exceptions to the general principle that each party should bear the costs of its own legal representation. We have long recognized that attorneys' fees may be awarded to a successful party when his opponent has acted in bad faith, vexatiously, wantonly, or for oppressive reasons,[17] or where a successful litigant

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[16] Judicial Council of Massachusetts, First Report, 11 Mass. L. Q. 1, 64 (1925).

[17] See, *e. g.*, *Vaughan* v. *Atkinson*, 369 U. S. 527 (1962); *McEnteggart* v. *Cataldo*, 451 F. 2d 1109 (CA1 1971); *Bell* v. *School Bd. of Powhatan County*, 321 F. 2d 494 (CA4 1963); *Rolax* v. *Atlantic Coast Line R. Co.*, 186 F. 2d 473 (CA4 1951); 6 J. Moore, Federal Practice ¶ 54.77 [2], p. 1709 (2d ed. 1974).

has conferred a substantial benefit on a class of persons and the court's shifting of fees operates to spread the cost proportionately among the members of the benefited class.[18] The lower courts have also applied a rationale for fee shifting based on the premise that the expense of litigation may often be a formidable if not insurmountable obstacle to the private litigation necessary to enforce important public policies.[19] This "private attorney general" rationale has not been squarely before this Court and it is not so now; nor do we intend to imply any view either on the validity or scope of that doctrine. It is sufficient for our purposes here to observe that this case clearly does not fall within any of these exceptions.

Miller Act suits are plain and simple commercial litigation. In effect then, we are being asked to go the last mile in this case, to judicially obviate the American Rule in the context of everyday commercial litigation, where

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[18] See, *e. g., Hall* v. *Cole*, 412 U. S. 1 (1973); *Mills* v. *Electric Auto-Lite Co.*, 396 U. S. 375 (1970); *Natural Resources Defense Council* v. *EPA*, 484 F. 2d 1331 (CA1 1973); *Callahan* v. *Wallace*, 466 F. 2d 59 (CA5 1972); *Bright* v. *Philadelphia-Baltimore-Washington Stock Exchange*, 327 F. Supp. 495, 506 (ED Pa. 1971); cf. Nussbaum, Attorney's Fees in Public Interest Litigation, 48 N. Y. U. L. Rev. 301 (1973); Comment, The Allocation of Attorney's Fees After *Mills* v. *Electric Auto-Lite Co.*, 38 U. Chi. L. Rev. 316 (1971).

[19] See, *e. g., Cooper* v. *Allen*, 467 F. 2d 836 (CA5 1972); *Knight* v. *Auciello*, 453 F. 2d 852 (CA1 1972); *Lee* v. *Southern Home Sites Corp.*, 444 F. 2d 143 (CA5 1971); *La Raza Unida* v. *Volpe*, 57 F. R. D. 94 (ND Cal. 1972); *Ross* v. *Goshi*, 351 F. Supp. 949 (Haw. 1972); *Sims* v. *Amos*, 340 F. Supp. 691 (MD Ala. 1972); cf. *Bradley* v. *School Bd. of the City of Richmond*, 416 U. S. 696 (1974); *Northcross* v. *Memphis Bd. of Education*, 412 U. S. 427 (1973); *Newman* v. *Piggie Park Enterprises, Inc.*, 390 U. S. 400 (1968); Nussbaum, n. 18, *supra;* Note, Awarding Attorneys' Fees to the "Private Attorney General": Judicial Green Light to Private Litigation in the Public Interest, 24 Hastings L. J. 733 (1973).

the policies which underlie the limited judicially created departures from the rule are inapplicable. This we are unprepared to do. The perspectives of the profession, the consumers of legal services, and other interested groups should be weighed in any decision to substantially undercut the application of the American Rule in such litigation. Congress is aware of the issue.[20] Thus whatever the merit of arguments for a further departure from the American Rule in Miller Act commercial litigation, those arguments are properly addressed to Congress.

The judgment of the Court of Appeals is affirmed insofar as it holds that Cerpac is a subcontractor for Miller Act purposes and that there was proper venue for suit on the shipment diverted to South Carolina, but reversed insofar as it holds that an award of attorneys' fees to respondent Industrial is required by the Act.

It is so ordered.

MR. JUSTICE DOUGLAS, dissenting in part.

The Court, dealing with the Miller Act's predecessor, held in *Illinois Surety Co.* v. *John Davis Co.*, 244 U. S. 376, 380, that the Heard Act "must be construed liberally." That same principle applies to the Miller Act. *Fleisher Co.* v. *United States ex rel. Hallenbeck*, 311 U. S. 15, 17–18. The Act is silent as to attorneys' fees, saying only that the payment bond shall allow the supplier "to prosecute said action to final execution and judgment for the sum or sums justly due him." 40 U. S. C. § 270b (a).

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[20] A congressional committee charged with making a broad-based inquiry about legal services is currently studying, *inter alia*, the general issue of attorneys' fees. Hearings on Legal Fees before the Subcommittee on Representation of Citizen Interests of the Senate Committee on the Judiciary, 93d Cong., 1st Sess. (1973); cf. S. Rep. No. 93–146 (1973), accompanying S. Res. 101.

The Miller Act is unlike the Lanham Act involved in *Fleischmann Distilling Corp.* v. *Maier Brewing Co.*, 386 U. S. 714. That Act itemized the components of the remedy which the Act afforded: injunctive relief, treble damages, and "costs" (which by federal statute did not include attorneys' fees). *Id.*, at 719–720. Moreover, attempts to amend the Lanham Act to include attorneys' fees had never succeeded, *id.*, at 721. Here there is no such legislative history; nor does the Miller Act itemize the components of the "sum or sums justly due."

The Court says that dependence on state law is inappropriate, for we deal with a federal standard that should be uniform. That takes great liberties with the Miller Act. Here the contract and law were made in California and were to be performed there. In *Illinois Surety Co.* v. *John Davis Co., supra,* the contract and law were made in Illinois and were to be performed there. "Questions of liability for interest must therefore be determined by the law of that State," said Mr. Justice Brandeis speaking for the Court, 244 U. S., at 381. If state law would give the claimant interest, it should give him attorneys' fees based on the purpose of the Miller Act. Judge Carter writing for the Court of Appeals pointed out that the Miller Act is the federal equivalent of state lien laws. See 473 F. 2d 720, 727. The remedy in a federal suit is therefore properly composed of the same elements as would be available to lien claimants in a state court collecting for labor and materials furnished on nonfederal projects. One of the elements of recovery permitted in a California court is attorneys' fees. The "sum or sums justly due" should as a matter of federal law be construed to be the same as that due a claimant whose remedy is based on a state statute, when the federal remedy was intended to be the equivalent of the state remedy.

What Mr. Justice Brandeis said of interest is equally applicable to attorneys' fees under the Miller Act.* Under the circumstances present here it would seem quite unjust not to include in the sum that is due the cost of collecting that sum.

*The Court of Appeals for the Fifth Circuit awarded attorneys' fees under a Florida statute where suit was brought under the Miller Act, *United States ex rel. Weyerhaeuser Co.* v. *Bucon Construction Co.*, 430 F. 2d 420, 425. And see *United States ex rel. White Masonry, Inc.* v. *F. D. Rich Co.*, 434 F. 2d 855, 859, where the Court of Appeals for the Ninth Circuit followed Alaska law.

COMMISSIONER OF INTERNAL REVENUE *v.* NATIONAL ALFALFA DEHYDRATING & MILLING CO.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

No. 73-9. Argued January 14, 1974—Decided May 28, 1974

Respondent corporate taxpayer, pursuant to a recapitalization plan, issued $50 face value 5% sinking fund debentures in exchange for its outstanding unlisted $50 par 5% cumulative preferred shares, which at the time were quoted at approximately $33 per share on the over-the-counter market. Based on the exchange, respondent claimed on its income tax returns for several years deductions for debt discount under § 163 (a) of the Internal Revenue Code of 1954, which allows deductions for interest paid on indebtedness. Respondent asserted that the debt discount, measured by the difference between a claimed $33 per share value for the preferred, and the face amount of the debentures, amortized over the life of the debentures, constituted deductible interest within the purview of that provision. The Commissioner disallowed the deductions, and was upheld by the Tax Court, but the Court of Appeals reversed. *Held:* Respondent did not incur amortizable debt discount upon the issuance of its debentures in exchange for its outstanding preferred stock. Pp. 142–155.

(a) In determining whether debt discount arises in the situation presented here, the relevant inquiry must be whether the corporate taxpayer has incurred, as a result of the transaction, some cost or expense of acquiring the use of capital. P. 147.

(b) The propriety of a deduction does not turn upon general equitable considerations, such as a demonstration of effective economic and practical equivalence to what actually occurred, but rather "depends upon legislative grace; and only as there is clear provision therefor can any particular deduction be allowed." *New Colonial Co.* v. *Helvering*, 292 U. S. 435, 440. Pp. 147–149.

(c) This Court will not speculate as to what the market price and the investor reaction to any sales of the debentures or purchases of the preferred by respondent in the open market would have been, since there is nothing in the record to establish the cash price at which the debentures could have been sold upon the

market or to indicate that respondent would have been able to purchase all its outstanding preferred on the open market, or at what price that stock would have been purchased in light of the impending exchange; moreover, when a corporation issues to its preferred shareholders its own new debt obligations in exchange for the outstanding preferred, the claimed fair market value of both securities is somewhat artificial since the exchange is effectively insulated from market forces. Pp. 149–151.

(d) Absent any evidence that the difference between the claimed $33 per share of the preferred and the face amount of the debentures is attributable to debt discount or that the discount rate was determined by such factors as respondent's financial condition at the time of the exchange and the availability and cost of capital in the general market as well as from the preferred shareholders, rather than simply having been predicated on the preferred's par value, the requisite evaluation of the property to be exchanged cannot occur and debt discount cannot be determined. P. 151.

(e) The alteration in the form of the retained capital did not give rise to any cost of borrowing to respondent, since the cost of the capital invested in respondent was the same whether represented by the preferred or by the debentures, and was totally unaffected by the market value of the preferred received in exchange. Pp. 151–155.

472 F. 2d 796, reversed.

BLACKMUN, J., delivered the opinion of the Court, in which BURGER, C. J., and DOUGLAS, BRENNAN, WHITE, MARSHALL, POWELL, and REHNQUIST, JJ., joined, and in Parts I, II, and III of which STEWART, J., joined. STEWART, J., concurred in the judgment.

Stuart A. Smith argued the cause for petitioner. With him on the brief were *Solicitor General Bork, Assistant Attorney General Crampton, Meyer Rothwacks,* and *Ernest J. Brown.*

Charles White Hess argued the cause for respondent. With him on the brief was *Ronald B. Stang.**

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*Briefs of *amici curiae* urging affirmance were filed by *Thomas E. Tyre* for Cities Service Co.; by *Robert T. Molloy, James Ogden, Mark M. Hennelly, Donald E. Engle, George E. Bailey, Robert E.*

MR. JUSTICE BLACKMUN delivered the opinion of the Court.

A corporate taxpayer in 1957 issued $50 face value 5% sinking fund debentures in exchange for its outstanding $50 par 5% cumulative preferred shares. At the time, the preferred apparently had a fair market value of less than $50 per share. This case presents the question whether, under § 163 (a) of the Internal Revenue Code of 1954, 26 U. S. C. § 163 (a),[1] the taxpayer is entitled to an income tax deduction for amortizable debt discount claimed to be the difference between the face amount of the debentures and the preferred's value at the time of the exchange.

I

The facts are stipulated. The respondent, National Alfalfa Dehydrating and Milling Company (hereinafter called "NAD" or the "taxpayer"), is a Delaware corporation organized in May 1946. It has its principal office at Shawnee Mission, Kansas. It is engaged in the business of dehydrating and milling alfalfa.

At its organization, NAD was authorized to issue $50 par cumulative preferred shares and $1 par common shares. The preferred was entitled to preferential dividends at the rate of 5% per annum and was redeemable, in whole or in part, at the discretion of the board of directors or through the operation of a sinking fund, at a stated, variable price which, in 1957, was $51 per share plus

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Simpson, and *James L. Boring* for St. Louis San Francisco Railway Co. et al.; by *Alan D. Berlin*, *Walter J. Rockler*, and *Julius M. Greisman* for Norton Simon, Inc.; and by *Paul A. Peterson* for Fed-Mart Corp.

[1] "§ 163. Interest.

"(a) General rule.

"There shall be allowed as a deduction all interest paid or accrued within the taxable year on indebtedness."

accrued dividends. The sinking fund provision required that 20% of net earnings (after the payment of the preferred's dividends) was to be set aside and employed for the redemption of preferred. Any shares so redeemed were to be retired and could not be reissued. If there was a dividend arrearage, the preferred could not be purchased, redeemed, or otherwise acquired for value by the corporation unless the holders of 50% of the preferred shares consented, or unless NAD notified all preferred shareholders of its desire to purchase and invited tender offers. Upon voluntary liquidation, the preferred was entitled to $50 per share plus accrued dividends before any distribution was made to holders of the common shares.

Prior to July 23, 1957, NAD had outstanding common shares and 47,059 preferred shares on which there were dividend arrearages of $10 per share. The preferred outstanding thus had an aggregate par value of $2,352,950 as of that date.

On April 8, 1957, NAD's board of directors adopted resolutions [2] "to effectuate a reorganization of the Company by way of recapitalization." App. 56. The plan proposed by the board had three steps: (1) an amendment of NAD's articles of incorporation to eliminate the preferred as of August 1, 1957, to increase the par value of the common from $1 to $3 and the number of shares of common authorized from 763,000 to 1,000,000, and to authorize the issue of warrants for the purchase of common shares; (2) the indentured issuance of $2,352,950 principal amount of 18-year 5% sinking fund debentures due July 1, 1975, with one $50 debenture to be exchanged for each share of outstanding $50 preferred; and (3) the issuance, to the holder of each share of preferred, of a

[2] The resolutions are set forth in full in the opinion of the Court of Appeals. 472 F. 2d 796, 798 n. 1 (CA10 1973).

warrant to purchase one-half share of common at $10 per share in lieu of the $10 dividend arrearage. The members of the board would have testified that the "principal business purpose behind the 1957 exchange of debentures for the preferred stock was to enable National Alfalfa to expand its eastern producing areas." *Id.*, at 25.

After the board had taken this action, NAD and Fidelity-Philadelphia Trust Company, as trustee, executed a trust indenture dated July 1, 1957, pursuant to which the aforementioned debentures were to be issued in exchange for NAD's outstanding preferred.[3]

Fidelity-Philadelphia Trust Company, on behalf of NAD, requested a ruling from the United States Treasury Department as to the federal income tax consequences of the plan. A responsive letter-ruling over the signature of the Chief, Reorganization and Dividend Branch, was forthcoming on May 29, 1957. The request had sought a ruling that all aspects of the plan would be tax free. The ruling, however, was to the effect that the exchange of the $1 par common for $3 par common "will

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[3] The indenture provided for subordination, redemption, and a sinking fund. Specifically, the debentures were to be subordinate to bank loans for inventory purposes and to obligations for materials, services, and labor supplied in the normal course of business. They were redeemable, in whole or in part, and from time to time, after July 1, 1958, at par plus accrued interest.

The sinking fund provision required NAD, after April 30, 1959, to set aside annually, for redemption of debentures at par plus accrued interest, the lesser of (a) the sum sufficient to redeem $196,080 face amount of debentures, or (b) the consolidated net earnings for the fiscal year, with the proviso that if the latter became applicable for any year, the fixed figure was to be cumulative.

NAD has not been in default in the performance of these indenture obligations. As of April 30, 1967, only $581,300 of the original $2,352,950 of debentures remained outstanding. The rest had been redeemed or otherwise repurchased or retired. App. 29.

constitute a recapitalization and, therefore, a reorganization, within the meaning of section 368 (a)(1)(E), of the Internal Revenue Code of 1954," 26 U. S. C. § 368 (a)(1)(E), and that, as a result thereof, under § 354 (a) of the Code, 26 U. S. C. § 354 (a), no gain or loss would be recognized on that exchange by NAD or by its common shareholders. App. 20. The ruling went on to state, "Assuming but not determining that the 5% debenture bonds to be issued qualify as securities (create a genuine relationship of debtor and creditor), gain or loss will be recognized to the preferred stockholders [under § 302 (a) of the Code, 26 U. S. C. § 302 (a)] from the exchange" of the preferred and the dividend arrearage for the debentures and warrants. The gain or loss so to be recognized would be "measured by the difference between the cost or other adjusted basis of the preferred stock surrendered and the fair market values of the debentures and warrants received." App. 20–21.

Shareholder approval of the plan proposed by the board was forthcoming in due course. Accordingly, NAD's articles were amended; on July 23, 1957, the holder of each share of preferred received, in exchange therefor, a $50 face value 5% debenture due July 1, 1975, and a warrant to subscribe to a half share of common at $10 per share in lieu of the dividend arrearage; and the preferred was eliminated and canceled as of August 1. This was reflected on NAD's books by a debit to the preferred stock account for $2,352,950, thereby eliminating that account, and by a credit to the liability account for the 18-year 5% debentures in the aggregate amount of $2,352,950.

NAD's preferred shares were not listed. During the period from July 15–30, 1957, the bid quotation for the preferred on the over-the-counter market ranged from a low of 29 to a high of 33, and the offering quotation

ranged from a low of 32 to a high of 35. App. 161.[4] On July 23, when the exchange was effected, the mid-point between the bid and offering quotations on the over-the-counter market was 33. The National Stock Summary for October 1, 1957, showed 100 shares of NAD preferred wanted on July 9 at 32 and on July 10 at 33, and 100 shares offered on July 10 at 35. *Id.*, at 167. It showed no quotations for the warrants in July and only nominal figure want quotations for them on four dates in August. *Id.*, at 168.

On each of its federal income tax returns for the fiscal years ended April 30, 1958, to 1967, inclusive, NAD claimed a deduction under § 163 (a) for what it regarded as interest, by reason of debt discount, measured by the difference between $33 per share for the preferred on July 23, 1957, and the face amount of the debentures. This difference amounted to $800,003 ($2,352,950 for the debentures, less $1,552,947 for the preferred). The $800,003 was then amortized on a straight-line basis over the 18-year life of the debentures, with an addition each year for the unamortized discount on any debentures currently repurchased or redeemed. See Rev. Rul. 70–353, 1970–2 Cum. Bull. 39. The deductions claimed are set forth in the margin;[5] those of the earlier years were reflected in losses carried over to fiscal 1967.

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[4]

Date	Bid	Offer	Date	Bid	Offer
July 15	33	35	July 23	32	34
July 16	32	35	July 24	32	35
July 17	32	34	July 25	29	32
July 18	31	34	July 26	30	33
July 19	32	34	July 29	30	33
July 22	31	33	July 30	30	33

[5] The deductions for discount taken by NAD on its returns for its fiscal year 1958 through 1967 were:

Upon audit of NAD's return for fiscal 1967, the Commissioner of Internal Revenue disallowed the debt discount of $109,804 claimed for that year and $321,657 in loss carryovers from prior taxable years that were due to debt-discount deductions asserted in those years. This resulted in a substantial deficiency in NAD's 1967 corporate income tax.

On petition for redetermination, the Tax Court, by a unanimous reviewed opinion, upheld the Commissioner. 57 T. C. 46 (1971). Adopting the reasoning of the Court of Claims in *Erie Lackawanna R. Co.* v. *United States,* 190 Ct. Cl. 682, 422 F. 2d 425 (1970), and in *Missouri Pacific R. Co.* v. *United States,* 192 Ct. Cl. 318, 427 F. 2d 727, modified on rehearing, 193 Ct. Cl. 257, 433 F. 2d 1324 (1970), cert. denied, 402 U. S. 944 (1971), the Tax Court held that when a corporation issues obligations in exchange for its outstanding preferred, no discount arises if the amount that had been received upon the issuance of the preferred was equal to

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Year Ended	Unamortized Discount On Bonds Currently Repurchased or Redeemed	Straight-line Amortization	Total
4/30/58	—0—	$37,037	$37,037
4/30/59	$20,104	43,273	63,377
4/30/60	17,007	42,310	59,317
4/30/61	—0—	28,743	28,743
4/30/62	14,062	27,751	41,813
4/30/63	—0—	27,751	27,751
4/30/64	26,624	25,562	52,186
4/30/65	37,903	22,168	60,071
4/30/66	4,139	21,761	25,900
4/30/67	98,824	10,980	109,804
			$505,999

App. 28.

the face amount of the obligations issued upon the exchange. The market value of the preferred at the time of the exchange, therefore, would be of no relevance.

On appeal, the United States Court of Appeals for the Tenth Circuit, by a divided vote, reversed. 472 F. 2d 796 (1973). Relying upon *American Smelting & Refining Co.* v. *United States,* 130 F. 2d 883 (CA3 1942), and *Atchison, T. & S. F. R. Co.* v. *United States,* 443 F. 2d 147 (CA10 1971), the court held that the difference between the value of the preferred and the face amount of the debentures at the time of the exchange represented a discount or expense of borrowing, and qualified as an interest deduction to be properly amortized over the life of the debentures. We granted certiorari to resolve the indicated conflict. 414 U. S. 817 (1973).

II

The situation with which we are here concerned, therefore, is one where a taxpayer corporation issued debt obligations, namely, debentures, in exchange for its *own* outstanding preferred shares. It is not one where the taxpayer issued debt obligations in exchange for cash in an amount less than the obligations' face amount, or in exchange for property other than its own stock.

Section 163 (a), which is set forth in n. 1, *supra,* is the statute NAD seeks to invoke in order to have the benefit of a deduction for what it claims is amortizable debt discount. The statute relates simply to "all interest paid or accrued within the taxable year on indebtedness." NAD's debentures obviously represented debt, and the stated 5% interest due semiannually on those debentures just as obviously would qualify as a deduction from gross income for NAD under § 163 (a). The issue here, however, is whether NAD is also entitled, in addition to the deduction for the stated interest, to a further deduction,

as "interest paid or accrued," for an appropriately amortized portion of the claimed $17 difference between the face amount of each $50 debenture and the value of each share of preferred on July 23, 1957.

Original-issue discount typically arises where an issuer sells its debt obligation on the market for *cash* at a price less than the face amount of the obligation. The difference, obviously, is the discount. A simple example is where a corporation issues its 6% $1,000 10-year bond for $950 cash. The corporation is obliged to pay and the bondholder is entitled to receive, the stated annual interest of 6%, or $60. That amount is deductible by the corporation and is includable in the payee's gross income as interest received. But the $50 difference between the face amount of the obligation and the issue price is an additional cost to the issuing corporation for the use of the money it is borrowing. That cost spread over the 10-year life of the bond amounts to $5 per year. Accepted accounting practice treats this discount as interest under § 163 (a).[6]

The Internal Revenue Code of 1939 and its predecessors did not provide explicitly for amortization and deduction of debt discount. The successive regulations, however, beginning with Art. 150 of Treasury Regulations 33 (revised 1918), issued under the Revenue Act of 1916, have provided for such amortization and deduction by the issuer.[7]

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[6] See H. Finney & H. Miller, Principles of Accounting, Intermediate 263 (6th ed. 1965); W. Meigs et al., Intermediate Accounting 683–688 (3d ed. 1974).

[7] Art. 544 of Regulations 45, promulgated under the Revenue Act of 1918; Art. 545 (3)(a) of Regulations 62, 65, and 69, promulgated, respectively, under the Revenue Acts of 1921, 1924, and 1926; Art. 68 (3)(a) of Regulations 74 and 77, promulgated, respectively, under the Revenue Acts of 1928 and 1932; Art. 22 (a)–

The first statutory recognition of bond discount appeared in § 1232 (b)(1) of the 1954 Code. That section provides:

> "For purposes of subsection (a), the term 'original issue discount' means the difference between the issue price and the stated redemption price at maturity. . . ."

Section 1232 (b)(2) defines "issue price" in some detail.[8]

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18 (3)(a) of Regulations 86, 94, and 101, promulgated respectively, under the Revenue Acts of 1934, 1936, and 1938; and § 29.22 (a)–17 (3)(a) of Regulations 111, promulgated under the Internal Revenue Code of 1939. See *Montana Power Co.* v. *United States*, 232 F. 2d 541, 546-548 (CA3), cert. denied, 352 U. S. 843 (1956).

Under the 1954 Code, the relevant provision first appeared in the Income Tax Regulations as § 1.61–12 (c)(3) concerning gross income:

"If bonds are issued by a corporation at a discount, the net amount of such discount is deductible and should be prorated or amortized over the life of the bonds. . . ."

Since the issuance of T. D. 6984, 1969–1 Cum. Bull. 38, this same language has appeared under the interest deduction provision in § 1.163–3 (a)(1).

[8] The 1954 Code's § 1232 (b)(2) was amended by the Interest Equalization Tax Act, Pub. L. 88–563, § 5, 78 Stat. 845, and by the Tax Reform Act of 1969, Pub. L. 91–172, § 413 (b), 83 Stat. 611, applicable to bonds and other evidences of indebtedness issued after May 27, 1969. As so amended, the statute, in pertinent part reads:

"In the case of a bond or other evidence of indebtedness [other than a bond or other evidence of indebtedness . . . issued pursuant to a plan of reorganization within the meaning of section 368 (a)(1)], which is issued for property and which—

"(A) is part of an issue a portion of which is traded on an established securities market, or

"(B) is issued for stock or securities which are traded on an established securities market,

"the issue price of such bond or other evidence of indebtedness . . . shall be the fair market value of such property. Except in cases

This Court has recognized debt discount as an additional cost incurred in borrowing money. In *Helvering* v. *Union Pacific R. Co.*, 293 U. S. 282 (1934), in considering Art. 150 of Regulations 33 (revised 1918), which described bond discount as a "loss" to be "prorated over the life of the bonds sold," the Court referred to discount not only as a loss but also as "interest paid for the use of capital procured by a bond issue." 293 U. S., at 286. More recently, in *United States* v. *Midland-Ross Corp.*, 381 U. S. 54 (1965), we clarified any ambiguity that may have resulted from the interest-loss approach when we stated, *id.*, at 57:

> "Earned original issue discount serves the same function as stated interest .... [I]t is simply 'compensation for the use or forbearance of money.' *Deputy* v. *du Pont*, 308 U. S. 488, 498."

It was also observed that,

> "despite some expressions indicating a contrary view, this Court has often recognized the economic function of discount as interest." *Id.*, at 66 (footnote omitted).

Accordingly, the discount may result ultimately in income to the purchaser,[9] but when amortized over the life of the obligation, it is deductible by the issuer.

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to which the preceding sentence applies, the issue price of a bond or other evidence of indebtedness . . . which is issued for property (other than money) shall be the stated redemption price at maturity."

Inasmuch as NAD's debentures were issued in 1957, the 1969 amendment is not applicable to the transaction.

[9] It was unsettled for some time whether income realized by an owner of an original discount obligation was taxable to that owner as ordinary income or as capital gain. In *Commissioner* v. *Caulkins*, 144 F. 2d 482 (CA6 1944), decided under the 1939 Code, it was held that gain upon surrender of an installment certificate issued at

While it is thus established that debt discount may ensue when a corporate debt obligation is issued at a discount for cash, this Court has never decided the question whether discount may result when debt obligations are issued in exchange for property other than cash. Those courts that have passed upon the issue have reached opposing conclusions. Compare *Nassau Lens Co.* v. *Commissioner*, 308 F. 2d 39 (CA2 1962); *American Smelting & Refining Co.* v. *United States*, 130 F. 2d 883 (CA3 1942); *Southern Fertilizer & Chemical Co.* v. *Edwards*, 167 F. Supp. 879 (MD Ga. 1955), to the effect that debt discount is available, with *Southern Natural Gas Co.* v. *United States*, 188 Ct. Cl. 302, 412 F. 2d 1222,

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a discount was capital gain. Other circuits, however, thereafter held that income attributable to the discount was ordinary income. See, for example, *Real Estate Investment Trust* v. *Commissioner*, 334 F. 2d 986 (CA1 1964), cert. denied, 381 U. S. 911 (1965); *Dixon* v. *United States*, 333 F. 2d 1016 (CA2 1964), aff'd, 381 U. S. 68 (1965); *United States* v. *Harrison*, 304 F. 2d 835 (CA5 1962), cert. denied, 372 U. S. 934 (1963); *Rosen* v. *United States*, 288 F. 2d 658 (CA3 1961); *Commissioner* v. *Morgan*, 272 F. 2d 936 (CA9 1959).

The issue was settled by the decision in *United States* v. *Midland-Ross Corp.*, 381 U. S. 54 (1965), when the Court held that earned original issue discount is not entitled to capital gain treatment under the 1939 Code.

Congress, in enacting § 1232 of the 1954 Code, adopted a different approach to earned original issue discount, referring to it as "a form of interest income" in S. Rep. No. 1622, 83d Cong., 2d Sess., 112 (1954). Under § 1232 (a)(2), gain from the sale or redemption of a corporate obligation issued at a discount is taxed as the gain from the sale of a noncapital asset. If the obligation is held by the original purchaser to maturity, the entire amount of the discount is so taxed, but if it is sold or redeemed before maturity, only the portion accrued up to the date of sale or redemption is so taxed. See De Kosmian, Original Issue Discount, 22 Tax Lawyer 339, 340–347 (1969); Zafft, Discount Bonds—Ordinary Income or Capital Gain?, 11 Tax L. Rev. 51 (1955).

1235–1239 (1969); *Montana Power Co.* v. *United States*, 141 Ct. Cl. 620, 159 F. Supp. 593, cert. denied, 358 U. S. 842 (1958); *Montana Power Co.* v. *United States*, 232 F. 2d 541 (CA3) (en banc),[10] cert. denied, 352 U. S. 843 (1956), to the effect that it is not available. This, of course, is a broader question than the one presented in the present case, and we need not, and do not, decide that broader issue. We are concerned, instead, only with the narrow issue whether debt discount arises where a corporate taxpayer issues an obligation in exchange for its own outstanding preferred shares.

In order properly to determine whether debt discount may be said to arise in such a situation, it becomes necessary to recognize the reason or factor that has been thought to justify the deduction. This has been the economic resemblance, in both form and function, which bond discount bears to stated interest for which the Revenue Acts and the Codes have allowed a deduction. Although, as has been noted, there has been some descriptive confusion in the regulations, with their references to "loss" as well as to "interest," and, as has also been noted, this Court, in *Helvering* v. *Union Pacific R. Co.*, 293 U. S., at 286, seemed to describe discount both as "interest paid for the use of capital" and as "loss resulting from the funding operation," the relevant inquiry in each case must be whether the issuer-taxpayer has incurred, as a result of the transaction, some cost or expense of acquiring the use of capital. It is to that inquiry we now turn.

III

It is NAD's position, of course, that amortizable bond discount arose on the exchange of its debentures for its

[10] Judge Kalodner, joined by Judge Staley, observed, "The American Smelting decision in that respect must be limited to its facts." 232 F. 2d, at 546.

outstanding preferred. It, and the Court of Appeals' majority, would look to what it calls the "economic realities" of the transaction in order to determine whether a cost of borrowing was incurred. The Court of Appeals likened the transaction to one where the corporation actually issued its $50 debenture for $33 in cash upon the open market (or to a holder of preferred) and then used that cash to purchase and retire outstanding preferred at $33 per share. 472 F. 2d, at 802. Upon such a transaction, it is claimed, there can be no question whatsoever that a deductible discount of $17 per debenture would result. It is argued that to deny similar treatment to the transaction which did take place, where a direct exchange was made with the preferred shareholder, would require a corporate taxpayer in the future to engage in a complex and expensive series of securities transactions in order to establish its entitlement to a deduction.

This argument, however, calls upon this Court to take two steps that we are reluctant and unwilling to take. First, it would require rejection of the established tax principle that a transaction is to be given its tax effect in accord with what actually occurred and not in accord with what might have occurred. Second, it would require us to speculate about the market price and value to the corporation of the debentures in question had they been sold upon the open market.

Even if we were to assume, *arguendo*, that the hypothetical transaction posed by the taxpayer and the Court of Appeals was indistinguishable, as a matter of economic reality, from what actually occurred, we would not be required, for that reason alone, to recognize a claimed deduction for debt discount. The propriety of a deduction does not turn upon general equitable considerations, such as a demonstration of effective economic and practi-

cal equivalence. Rather, it "depends upon legislative grace; and only as there is clear provision therefor can any particular deduction be allowed." *New Colonial Ice Co.* v. *Helvering,* 292 U. S. 435, 440 (1934); *Deputy* v. *Du Pont,* 308 U. S. 488, 493 (1940). This Court has observed repeatedly that, while a taxpayer is free to organize his affairs as he chooses, nevertheless, once having done so, he must accept the tax consequences of his choice, whether contemplated or not, *Higgins* v. *Smith,* 308 U. S. 473, 477 (1940); *Old Mission Portland Cement Co.* v. *Helvering,* 293 U. S. 289, 293 (1934); *Gregory* v. *Helvering,* 293 U. S. 465, 469 (1935), and may not enjoy the benefit of some other route he might have chosen to follow but did not. "To make the taxability of the transaction depend upon the determination whether there existed an alternative form which the statute did not tax would create burden and uncertainty." *Founders General Corp.* v. *Hoey,* 300 U. S. 268, 275 (1937); *Television Industries, Inc.* v. *Commissioner,* 284 F. 2d 322, 325 (CA2 1960); *Interlochen Co.* v. *Commissioner,* 232 F. 2d 873, 877 (CA4 1956). See *Gray* v. *Powell,* 314 U. S. 402, 414 (1941).

Both the rationale and the wisdom of the Court's attitude toward such attempts at reconstruction of transactions are particularly well demonstrated in the present case. In the absence of any actual or even attempted sales of debentures or purchases of the preferred by NAD in the open market, the Court is called upon to speculate as to what the market price and the investor reaction to such events would have been. There are several reasons why we cannot do this:

First, there is nothing in the record establishing the cash price at which the debentures could have been sold upon the market had they been offered for sale. The current rate for money and the credit status of the bor-

rower are pertinent factors in the determination of discount (or premium) on an open market, as contrasted with a closed transaction.

Second, there is also nothing in the record to indicate that NAD would have been able to purchase all its outstanding preferred on the open market, or at what price that quantity of stock would have been purchased in light of the impending exchange. See *Gulf, M. & O. R. Co.* v. *United States,* 339 F. Supp. 489 (SD Ala.), final decision 31 A. F. T. R. 2d 73–436 (1972), pending on appeal to CA5 and deferred awaiting the decision in this case; *Cities Service Co.* v. *United States,* 316 F. Supp. 61 (SDNY 1970) and 362 F. Supp. 830 (SDNY 1973), appeal to CA2 pending. The stipulated over-the-counter quotations, set forth in n. 4, *supra,* and in the cited National Stock Summary, are quotations only for what at most was a thin market, and were hardly representative of the fair market value of the entire 47,059 preferred shares outstanding. The preferred's redemption price at the time was $51 plus the arrearage, or a total of $61, almost double the claimed $33 per share.

Third, when a corporation issues to its preferred shareholders its own new debt obligations in exchange for outstanding preferred, the claimed fair market value of both securities is somewhat artificial since the exchange is effectively insulated from market forces by the intracorporate and private nature of the transaction. See *Missouri Pacific R. Co.* v. *United States,* 192 Ct. Cl., at 324–325, 427 F. 2d, at 730–731. The economics underlying discount is that it is an adjustment of the difference between the interest prescribed in the instrument issued and the prevailing market rate for money, and it arises because the prescribed rate is too low to sell the obligations at par in that market. See *San Joaquin Light & Power Corp.* v. *McLaughlin,* 65 F. 2d 677, 679 (CA9

1933). Thus, implicit in the concept of debt discount is the assumption, and indeed the requirement, that the transaction be subject to the exigencies of the competitive money market.

Here, there has been no demonstration that the difference between the claimed $33 per share value of NAD's preferred (laying aside for the moment the aforementioned difficulties in arriving at that determination) and the face amount of the debentures is attributable to debt discount. As the Tax Court noted, 57 T. C., at 52 n. 6, there is no evidence of what the fair market value of the bonds was at the time of their issuance. Other factors that would have to be considered would include NAD's financial condition at the time of the exchange, including both its credit position and its profits prospects, and the availability and cost of capital in the general market as well as from its preferred shareholders. Normally, the market itself performs this evaluative process. Aside from the fact that the transaction was insulated from the market processes, there has been no attempt here to show that the discount rate was determined with a view toward accounting for these several factors rather than simply having been predicated on the par value of the preferred. Accordingly, the requisite evaluation of the property to be exchanged cannot occur in this intracorporate transaction and debt discount cannot be determined. Cf. *Gulf, M. & O. R. Co.* v. *United States, supra; Southern Fertilizer & Chemical Co.* v. *Edwards*, 167 F. Supp., at 881.

IV

It has not been demonstrated that NAD, by the exchange, incurred any additional cost for the use of capital. NAD merely replaced that portion of its paid-in capital represented by its preferred with paid-in capital represented by its debentures. From the perspective of the

corporation, the transaction was the exchange of one form of interest or participation in the corporation for another. But the corporate assets were neither increased nor diminished.[11]

To be sure, upon the issuance of its debentures, NAD assumed a fixed obligation to pay at a date certain. The transaction, therefore, perhaps could be said to be something more than a mere reshuffling of the corporation's capital structure, see *Helvering* v. *Southwest Consolidated Corp.*, 315 U. S. 194, 202 (1942), since a creditor was substituted for a holder with an ownership interest.[12] But again, when viewed from the corporation's perspective, and regardless of the income tax effect upon the former preferred shareholder, which we deem to be irrelevant, there has been no new capital acquired and no additional cost incurred in retaining the old capital. See *St. Louis-S. F. R. Co.* v. *United States*, 195 Ct. Cl. 343, 350, 444 F. 2d 1102, 1106 (1971), cert. denied, 404 U. S. 1017 (1972).

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[11] In *Old Mission Portland Cement Co.* v. *Helvering*, 293 U. S. 289 (1934), where original issue discount bonds were held by an affiliate of the issuing corporation, the Court concluded that a deduction for the discount was not available when the affiliated corporations filed a consolidated income tax return. The situation was related to that of a single taxpayer purchasing its own bonds prior to maturity. Because, viewing the affiliates as a single taxpaying entity, there was no obligation to pay the face amount at maturity, the issuer "could not afterwards deduct, from gross income, the amortized discount on the bonds, in anticipation of their payment at maturity." *Id.*, at 292. Here NAD incurred no additional obligation because of the substitution of its debentures for its preferred.

[12] While in no sense implying that the securities were equivalent, the Court in the past has noted that the investment difference between preferred shares and unsecured debentures can be of slight degree, and is further diminished when, as here, the debentures are subordinated. *John Kelley Co.* v. *Commissioner*, 326 U. S. 521 (1946).

In obvious explanation of this, NAD originally received $50 cash for each share of preferred. Although it was not obligated to repay that sum at any fixed time, it made use of that cash pursuant to the provisions of its articles, including both the sinking fund and the redemption-liquidation provisions. Upon the exchange, the corporation canceled the preferred, and thus eliminated the preferred stock account upon its books, together with the preferred's attendant obligations. The market value of the preferred at that moment bore no direct relationship to the amount of funds on hand. The capital "freed" by the cancellation of the preferred was merely transferred to the liability account for the debentures. No new capital was involved. See *Claussen's, Inc.* v. *United States*, 469 F. 2d 340 (CA5 1972).[13]

It is true that there was some change in the corporate structure. Henceforth, NAD would receive a deduction for interest paid on the debentures, whereas the 5% dividend paid on the preferred had not been deductible. The common shareholders were benefited by the elimination of the dividend arrearages on the preferred and by the elimination of the premium payable on the preferred's retirement. Yet the change was not great. The fixed interest on the debentures was equal to the cumulative dividend on the preferred, and both the preferred and

[13] "We simply cannot overlook the complete lack of substance to the claims of the corporation here. Its assets were not diminished by a penny, either when the debentures were issued to the stockholders or where the face amount of the bonds was assumed by Fuqua (thus, presumably reducing the amount of the purchase price). The company paid nothing more to the bond-holders at any time than the current interest. It did not sell them to anyone at a discount. It issued them either as dividend, partial distribution of earned income and capital, or as 'boot' in a tax-free reorganization. It cannot deduct as interest what it has not paid out or become liable to pay out to anybody." 469 F. 2d, at 344 n. 11.

the debentures worked equal diminutions in the earnings otherwise available for the common shareholders. The debentures, of course, were to mature in 1975, but the sinking fund provisions for both the preferred and the debentures were comparable. Thus, the interest of the preferred shareholders "was fairly reflected in the highly equivalent characteristics of the debentures into which the preferred was converted." *Penfield* v. *Davis*, 105 F. Supp. 292, 311 (ND Ala. 1952), aff'd, 205 F. 2d 798 (CA5 1953). The cost of the capital invested in the corporation was the same whether represented by the preferred or by the debentures, and was totally unaffected by the market value of the shares received at the time of the issuance of the debentures. Accordingly, while recognizing the alteration which did occur in the corporation's capital structure, we conclude that the substitution by NAD of its debentures for its previously outstanding preferred, without more, did not create an obligation to pay in excess of an amount previously committed, or establish the base upon which debt discount can arise.

In sum, the alteration in the form of the retained capital did not give rise to any cost of borrowing to NAD. The fact that the preferred may have been worth something in the neighborhood of only $33 per share on the market at the time of the exchange was of no consequence, since NAD was not required to go into that market and purchase those shares. It was able, instead, to obtain the preferred merely by canceling the $50 obligation per share on its equity account and transferring that amount to its debt account. It is in this sense that an exchange of a corporation's own outstanding preferred for newly issued debt obligations may differ, in the tax sense, from an exchange for other property. Such other property—for example, inventory or the stock

of another corporation—does not equate with a previous contribution of capital which can continue to be utilized by the corporation at no cost upon cancellation of the preferred equity account.

We hold, accordingly, that NAD did not incur amortizable bond discount upon the issuance of its $50 face value 5% debentures in exchange for its outstanding $50 par cumulative preferred stock. The judgment of the Court of Appeals is reversed.

It is so ordered.

Mr. JUSTICE STEWART concurs in the judgment and in Parts I, II, and III of the Court's opinion.

EISEN *v.* CARLISLE & JACQUELIN ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

No. 73–203. Argued February 25, 1974—Decided May 28, 1974

Petitioner brought a class action under Fed. Rule Civ. Proc. 23 on behalf of himself and all odd-lot traders on the New York Stock Exchange for a certain four-year period, charging respondent brokerage firms, which handled 99% of the Exchange's odd-lot business, and respondent Exchange with violating the antitrust and securities laws. There followed a series of decisions by the District Court and the Court of Appeals. The District Court ultimately decided that the suit could be maintained as a class action, and, after finding that some two and a quarter million members of the prospective class could be identified by name and address with reasonable effort and that it would cost $225,000 to send individual notice to all of them, proposed a notification scheme providing for individual notice to only a limited number of prospective class members and notice by publication to the remainder. The District Court then held a preliminary hearing on the merits, and after finding that petitioner was "more than likely" to prevail at trial, ruled that respondents should bear 90% of the costs of the notification scheme. The Court of Appeals reversed and ordered the suit dismissed as a class action, disapproving the District Court's partial reliance on publication notice. The Court of Appeals held that Rule 23 (c)(2) required individual notice to all identifiable class members; that the District Court had no authority to hold a preliminary hearing on the merits for the purpose of allocating notice costs; that the entire notice expense should fall on petitioner; and that the proposed class action was unmanageable under Rule 23 (b)(3)(D). Petitioner contends that the Court of Appeals had no jurisdiction to review the District Court's orders, and further, that the Court of Appeals decided the above issues incorrectly. *Held:*

1. The District Court's resolution of the notice problems constituted a "final" decision within the meaning of 28 U. S. C. § 1291 and was therefore appealable as of right under that section. Pp. 169–172.

(a) Section 1291 does not limit appellate review to "those

final judgments which terminate an action . . . ," but rather the requirement of finality is to be given a "practical rather than a technical construction." *Cohen* v. *Beneficial Loan Corp.*, 337 U. S. 541, 545–546. Pp. 170–172.

(b) The District Court's decision that respondents could lawfully be required to bear the costs of notice involved a collateral matter unrelated to the merits of petitioner's claims and was "a final disposition of a claimed right which is not an ingredient of the cause of action and does not require consideration with it," *Cohen, supra,* at 546–547. P. 172.

2. The District Court's resolution of the notice problems failed to comply with the notice requirement of Rule 23 (c)(2). Pp. 173–177.

(a) The express language and intent of Rule 23 (c)(2) leave no doubt that individual notice must be sent to all class members who can be identified through reasonable effort. Here there was nothing to show that individual notice could not be mailed to each of the two and a quarter million class members whose names and addresses were easily ascertainable, and for these class members individual notice was clearly the "best notice practicable" within the meaning of Rule 23 (c)(2). Pp. 173–175.

(b) The facts that the cost of sending individual notices would be prohibitively high to petitioner, who has only a $70 stake in the matter, or that individual notice might be unnecessary because no prospective class member has a large enough stake to justify separate litigation of his individual claim, do not dispense with the individual-notice requirement, since individual notice to identifiable class members is not a discretionary consideration to be waived in a particular case but an unambiguous requirement of Rule 23. Pp. 175–176.

(c) Adequate representation in itself does not satisfy Rule 23 (c)(2), since the Rule speaks to notice as well as to adequacy of representation and requires that both be provided. Otherwise no notice at all, published or otherwise, would be required in this case. Pp. 176–177.

3. Petitioner must bear the cost of notice to the members of his class, and it was improper for the District Court to impose part of the cost on respondents. Pp. 177–179.

(a) There is nothing in either the language or history of Rule 23 that gives a court any authority to conduct a preliminary inquiry into the merits of a suit in order to determine whether

it may be maintained as a class action, and, indeed, such a procedure contravenes the Rule by allowing a representative plaintiff to secure the benefits of a class action without first satisfying the requirements of the Rule. Pp. 177–178.

(b) A preliminary determination of the merits may substantially prejudice a defendant, since it is unaccompanied by the traditional rules and procedures applicable to civil trials. P. 178.

(c) Where, as here, the relationship between the parties is truly adversary, the plaintiff must pay for the cost of notice as part of the ordinary burden of financing his own suit. Pp. 178–179.

479 F. 2d 1005, vacated and remanded.

POWELL, J., delivered the opinion of the Court, in which BURGER, C. J., and STEWART, WHITE, BLACKMUN, and REHNQUIST, JJ., joined. DOUGLAS, J., filed an opinion dissenting in part, in which BRENNAN and MARSHALL, JJ., joined, *post*, p. 179.

Aaron M. Fine argued the cause for petitioner. With him on the briefs were *Mordecai Rosenfeld* and *Harold E. Kohn.*

Devereux Milburn and *William Eldred Jackson* argued the cause for respondents. With them on the briefs were *Louis L. Stanton, Jr.*, and *Russell E. Brooks.**

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*Briefs of *amici curiae* urging reversal were filed by *Louis J. Lefkowitz*, Attorney General, *pro se*, *Samuel A. Hirshowitz*, First Assistant Attorney General, and *George D. Zuckerman* and *Arnold D. Fleischer*, Assistant Attorneys General, for the Attorney General of New York; by *Israel Packel*, Attorney General, *Lawrence Silver* and *Gerry J. Elman*, Deputy Attorneys General, and *David Berger* for the Commonwealth of Pennsylvania; by *Evelle J. Younger*, Attorney General, *Anthony C. Joseph*, Assistant Attorney General, and *Michael I. Spiegel*, Deputy Attorney General, for the State of California; by *William J. Baxley*, Attorney General of Alabama, *Norman C. Gorsuch*, Attorney General of Alaska, *Gary K. Nelson*, Attorney General of Arizona, *Arthur K. Bolton*, Attorney General of Georgia, *Ed W. Hancock*, Attorney General of Kentucky, *Robert H. Quinn*, Attorney General, and *Leo Schwartz*, Special Assistant Attorney General of Massachusetts, *John C. Danforth*, Attorney General of Missouri, *Allen I. Olson*, Attorney General of North Dakota, *Richard*

MR. JUSTICE POWELL delivered the opinion of the Court.

On May 2, 1966, petitioner filed a class action on behalf of himself and all other odd-lot [1] traders on the New York Stock Exchange (the Exchange). The complaint charged respondents with violations of the antitrust and securities laws and demanded damages for petitioner and his class. Eight years have elapsed, but there has been no trial on the merits of these claims. Both the parties and the courts are still wrestling with the complex questions surrounding petitioner's attempt to maintain his suit as a class action under Fed. Rule Civ. Proc. 23. We granted certiorari to resolve some of these difficulties. 414 U. S. 908 (1973).

J. Israel, Attorney General of Rhode Island, *Kimberly B. Cheney*, Attorney General of Vermont, *Robert I. Shevin*, Attorney General of Florida, *Richard C. Turner*, Attorney General of Iowa, *William J. Guste*, Attorney General of Louisiana, *A. F. Summer*, Attorney General of Mississippi, *Louis J. Lefkowitz*, Attorney General of New York, *Larry Derryberry*, Attorney General of Oklahoma, *Kermit A. Sande*, Attorney General of South Dakota, *Andrew P. Miller*, Attorney General of Virginia, and *David I. Shapiro* and *James vanR. Springer* for the State of Alabama et al.; by *Sheldon V. Burman* for the New York State Trial Lawyers Assn.; by *Edward I. Pollock*, *Leonard Sacks*, and *Stephen I. Zetterberg* for the California Trial Lawyers Assn.; by *Melvin L. Wulf* and *Burt Neuborne* for the American Civil Liberties Union; by *Jack Greenberg*, *James M. Nabrit III*, *Charles Stephen Ralston*, and *Eric Schnapper* for the NAACP Legal Defense and Educational Fund, Inc.; and by *Alan B. Morrison* for the Public Citizen and Consumers Union of United States, Inc.

Briefs of *amici curiae* urging affirmance were filed by *William C. Falkenhainer* and *Rollin E. Woodbury* for Southern California Edison Co., and by *Samuel E. Gates*, *Dwight B. Buss*, *Ralph L. McAfee*, *Carl J. Schuck*, *Marvin Schwartz*, *William Simon*, *George A. Spiegelberg*, and *Philip H. Strubing* for the American College of Trial Lawyers.

[1] Odd lots are shares traded in lots of fewer than a hundred. Shares traded in units of a hundred or multiples thereof are round-lots.

I

Petitioner brought this class action in the United States District Court for the Southern District of New York. Originally, he sued on behalf of all buyers and sellers of odd lots on the Exchange, but subsequently the class was limited to those who traded in odd lots during the period from May 1, 1962, through June 30, 1966. 52 F. R. D. 253, 261 (1971). Throughout this period odd-lot trading was not part of the Exchange's regular auction market but was handled exclusively by special odd-lot dealers, who bought and sold for their own accounts as principals. Respondent brokerage firms Carlisle & Jacquelin and DeCoppet & Doremus together handled 99% of the Exchange's odd-lot business. S. E. C., Report of Special Study of Securities Markets, H. R. Doc. No. 95, pt. 2, 88th Cong., 1st Sess., 172 (1963). They were compensated by the odd-lot differential, a surcharge imposed on the odd-lot investor in addition to the standard brokerage commission applicable to round-lot transactions. For the period in question the differential was ⅛ of a point (12½¢) per share on stocks trading below $40 per share and ¼ of a point (25¢) per share on stocks trading at or above $40 per share.[2]

Petitioner charged that respondent brokerage firms had monopolized odd-lot trading and set the differential at an excessive level in violation of §§ 1 and 2 of the Sherman Act, 15 U. S. C. §§ 1 and 2, and he demanded treble damages for the amount of the overcharge. Petitioner also demanded unspecified money damages from the Exchange for its alleged failure to regulate the differential for the protection of investors in violation of §§ 6 and 19 of the Securities Exchange Act of 1934, 15 U. S. C. §§ 78f and 78s. Finally, he requested attor-

[2] On July 1, 1966, the $40 "breakpoint" was raised to $55.

neys' fees and injunctive prohibition of future excessive charges.

A critical fact in this litigation is that petitioner's individual stake in the damages award he seeks is only $70. No competent attorney would undertake this complex antitrust action to recover so inconsequential an amount. Economic reality dictates that petitioner's suit proceed as a class action or not at all. Opposing counsel have therefore engaged in prolonged combat over the various requirements of Rule 23. The result has been an exceedingly complicated series of decisions by both the District Court and the Court of Appeals for the Second Circuit. To understand the labyrinthian history of this litigation, a preliminary overview of the decisions may prove useful.

In the beginning, the District Court determined that petitioner's suit was not maintainable as a class action. On appeal, the Court of Appeals issued two decisions known popularly as *Eisen I* and *Eisen II*. The first held that the District Court's decision was a final order and thus appealable. In the second the Court of Appeals intimated that petitioner's suit could satisfy the requirements of Rule 23, but it remanded the case to permit the District Court to consider the matter further. After conducting several evidentiary hearings on remand, the District Court decided that the suit could be maintained as a class action and entered orders intended to fulfill the notice requirements of Rule 23. Once again, the case was appealed. The Court of Appeals then issued its decision in *Eisen III* and ended the trilogy by denying class action status to petitioner's suit. We now review these developments in more detail.

Eisen I

As we have seen, petitioner began this action in May 1966. In September of that year the District Court

dismissed the suit as a class action. 41 F. R. D. 147. Following denial of his motion for interlocutory review under 28 U. S. C. § 1292 (b), petitioner took an appeal as of right under § 1291. Respondents then moved to dismiss on the ground that the order appealed from was not final. In *Eisen I*, the Court of Appeals held that the denial of class action status in this case was appealable as a final order under § 1291. 370 F. 2d 119 (1966), cert. denied, 386 U. S. 1035 (1967). This was so because, as a practical matter, the dismissal of the class action aspect of petitioner's suit was a "death knell" for the entire action. The court thought this consequence rendered the order dismissing the class action appealable under *Cohen* v. *Beneficial Loan Corp.*, 337 U. S. 541, 546 (1949).

Eisen II

Nearly 18 months later the Court of Appeals reversed the dismissal of the class action in a decision known as *Eisen II*. 391 F. 2d 555 (1968). In reaching this result the court undertook an exhaustive but ultimately inconclusive analysis of Rule 23. Subdivision (a) of the Rule sets forth four prerequisites to the maintenance of any suit as a class action: "(1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class." The District Court had experienced little difficulty in finding that petitioner satisfied the first three prerequisites but had concluded that petitioner might not "fairly and adequately protect the interests of the class" as required by Rule 23 (a)(4). The Court of Appeals indicated its disagreement with the

reasoning behind the latter conclusion and directed the District Court to reconsider the point.

In addition to meeting the four conjunctive requirements of 23 (a), a class action must also qualify under one of the three subdivisions of 23 (b).[3] Petitioner argued that the suit was maintainable as a class action under all three subdivisions. The Court of Appeals held the first two subdivisions inapplicable to this suit[4] and

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[3] "(b) Class Actions Maintainable.

"An action may be maintained as a class action if the prerequisites of subdivision (a) are satisfied, and in addition:

"(1) the prosecution of separate actions by or against individual members of the class would create a risk of

"(A) inconsistent or varying adjudications with respect to individual members of the class which would establish incompatible standards of conduct for the party opposing the class, or

"(B) adjudications with respect to individual members of the class which would as a practical matter be dispositive of the interests of the other members not parties to the adjudications or substantially impair or impede their ability to protect their interests; or

"(2) the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole; or

"(3) the court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy. The matters pertinent to the findings include: (A) the interest of members of the class in individually controlling the prosecution or defense of separate actions; (B) the extent and nature of any litigation concerning the controversy already commenced by or against members of the class; (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; (D) the difficulties likely to be encountered in the management of a class action."

[4] Before the Court of Appeals, petitioner dropped the contention that the suit qualified under subdivision (b)(1)(B). The court held subdivision (b)(1)(A) inapplicable on the ground that the pro-

therefore turned its attention to the third subdivision, (b)(3). That subdivision requires a court to determine whether "questions of law or fact common to the members of the class predominate over any questions affecting only individual members" and whether "a class action is superior to other available methods for the fair and efficient adjudication of the controversy." More specifically, it identifies four factors relevant to these inquiries. After a detailed review of these provisions, the Court of Appeals concluded that the only potential barrier to maintenance of this suit as a class action was the Rule 23 (b)(3)(D) directive that a court evaluate "the difficulties likely to be encountered in the management of a class action." Commonly referred to as "manageability," this consideration encompasses the whole range of practical problems that may render the class action format inappropriate for a particular suit. With reference to this litigation, the Court of Appeals noted that the difficulties of distributing any ultimate recovery to the class members would be formidable, though not necessarily insuperable, and commented that it was "reluctant to permit actions to proceed where they are not likely to benefit anyone but the lawyers who bring them." 391 F. 2d, at 567. The Court therefore directed the District Court to conduct "a further inquiry . . . in order to consider the mechanics involved in the administration of the present action." *Ibid.*

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spective class consisted entirely of small claimants, none of whom could afford to litigate this action in order to recover his individual claim and that consequently there was little chance of "inconsistent or varying adjudications with respect to individual members of the class which would establish incompatible standards of conduct for the party opposing the class . . . ." Subdivision (b)(2) was held to apply only to actions exclusively or predominantly for injunctive or declaratory relief. Advisory Committee's Note, Proposed Rules of Civil Procedure, 28 U. S. C. App., p. 7766.

Finally, the Court of Appeals turned to the most imposing obstacle to this class action—the notice requirement of Rule 23 (c)(2). The District Court had held that both the Rule and the Due Process Clause of the Fifth Amendment required individual notice to all class members who could be identified. 41 F. R. D., at 151. Petitioner objected that mailed notice to the entire class would be prohibitively expensive and argued that some form of publication notice would suffice. The Court of Appeals declined to settle this issue, noting that "[o]n the record before us we cannot arrive at any rational and satisfactory conclusion on the propriety of resorting to some form of publication as a means of giving the necessary notice to all members of the class on behalf of whom the action is stated to be commenced and maintained." 391 F. 2d, at 569.

The outcome of *Eisen II* was a remand for an evidentiary hearing on the questions of notice, manageability, adequacy of representation, and "any other matters which the District Court may consider pertinent and proper." *Id.*, at 570. And in a ruling that aroused later controversy, the Court of Appeals expressly purported to retain appellate jurisdiction while the case was heard on remand.

Eisen III

After it held the evidentiary hearing on remand, which together with affidavits and stipulations provided the basis for extensive findings of fact, the District Court issued an opinion and order holding the suit maintainable as a class action. 52 F. R. D. 253 (1971). The court first noted that petitioner satisfied the criteria identified by the Court of Appeals for determining adequacy of representation under Rule 23 (a)(4). Then it turned to the more difficult question of manageability. Under this general rubric the court dealt with problems of the com-

putation of damages, the mechanics of administering this suit as a class action, and the distribution of any eventual recovery. The last-named problem had most troubled the Court of Appeals, prompting its remark that if "class members are not likely ever to share in an eventual judgment, we would probably not permit the class action to continue." 391 F. 2d, at 567. The District Court attempted to resolve this difficulty by embracing the idea of a "fluid class" recovery whereby damages would be distributed to future odd-lot traders rather than to the specific class members who were actually injured. The court suggested that "a fund equivalent to the amount of unclaimed damages might be established and the odd-lot differential reduced in an amount determined reasonable by the court until such time as the fund is depleted." 52 F. R. D., at 265. The need to resort to this expedient of recovery by the "next best class" arose from the prohibitively high cost of computing and awarding multitudinous small damages claims on an individual basis.

Finally, the District Court took up the problem of notice. The court found that the prospective class included some six million individuals, institutions, and intermediaries of various sorts; that with reasonable effort some two million of these odd-lot investors could be identified by name and address; [5] and that the names and addresses of an additional 250,000 persons who had participated in special investment programs involving

[5] These two million traders dealt with brokerage firms who transmitted their odd-lot transactions to respondents Carlisle & Jacquelin and DeCoppet & Doremus via teletype. By comparing the odd-lot firms' computerized records of these teletype transactions and the general-services brokerage firms' computerized records of all customer names and addresses, the names and addresses of these two million odd-lot traders can be obtained.

odd-lot trading[6] could also be identified with reasonable effort. Using the then current first-class postage rate of six cents, the court determined that stuffing and mailing each individual notice form would cost 10 cents. Thus individual notice to all identifiable class members would cost $225,000,[7] and additional expense would be incurred for suitable publication notice designed to reach the other four million class members.

The District Court concluded, however, that neither Rule 23 (c)(2) nor the Due Process Clause required so substantial an expenditure at the outset of this litigation. Instead, it proposed a notification scheme consisting of four elements: (1) individual notice to all member firms of the Exchange and to commercial banks with large trust departments; (2) individual notice to the approximately 2,000 identifiable class members with 10 or more odd-lot transactions during the relevant period; (3) individual notice to an additional 5,000 class members selected at random; and (4) prominent publication notice in the Wall Street Journal and in other newspapers in New York and California. The court calculated that this package would cost approximately $21,720.

The only issue not resolved by the District Court in its first opinion on remand from *Eisen II* was who should bear the cost of notice. Because petitioner understandably declined to pay $21,720 in order to litigate an action

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[6] In the period from May 1962 through June 1968, 100,000 individuals had odd-lot transactions through participation in the Monthly Investment Plan operated by the Exchange and 150,000 persons traded in odd lots through participation in a number of payroll deduction plans operated by Merrill Lynch, Pierce, Fenner & Smith,

[7] Adjusting this figure to reflect the subsequent 4¢ increase in first-class postage would yield a figure of $315,000.

involving an individual stake of only $70, this question presented something of a dilemma:

> "If the expense of notice is placed upon [petitioner], it would be the end of a possibly meritorious suit, frustrating both the policy behind private antitrust actions and the admonition that the new Rule 23 is to be given a liberal rather than a restrictive interpretation, Eisen II at 563. On the other hand, if costs were arbitrarily placed upon [respondents] at this point, the result might be the imposition of an unfair burden founded upon a groundless claim. In addition to the probability of encouraging frivolous class actions, such a step might also result in [respondents'] passing on to their customers, including many of the class members in this case, the expenses of defending these actions." 52 F. R. D., at 269.

Analogizing to the laws of preliminary injunctions, the court decided to impose the notice cost on respondents if petitioner could show a strong likelihood of success on the merits, and it scheduled a preliminary hearing on the merits to facilitate this determination. After this hearing the District Court issued an opinion and order ruling that petitioner was "more than likely" to prevail at trial and that respondents should bear 90% of the cost of notice, or $19,548. 54 F. R. D. 565, 567 (1972).

Relying on the purported retention of jurisdiction by the Court of Appeals after *Eisen II*, respondents on May 1, 1972, obtained an order directing the clerk of the District Court to certify and transmit the record for appellate review. Subsequently, respondents also filed a notice of appeal under 28 U. S. C. § 1291. Petitioner's motion to dismiss on the ground that the appeal had not been taken from a final order was denied by the Court of Appeals on June 29, 1972.

On May 1, 1973, the Court of Appeals issued *Eisen III*. 479 F. 2d 1005. The majority disapproved the District Court's partial reliance on publication notice, holding that Rule 23 (c)(2) required individual notice to all identifiable class members. The majority further ruled that the District Court had no authority to conduct a preliminary hearing on the merits for the purpose of allocating costs and that the entire expense of notice necessarily fell on petitioner as representative plaintiff. Finally, the Court of Appeals rejected the expedient of a fluid-class recovery and concluded that the proposed class action was unmanageable under Rule 23 (b)(3)(D). For all of these reasons the Court of Appeals ordered the suit dismissed as a class action. One judge concurred in the result solely on the ground that the District Court had erred in imposing 90% of the notice costs on respondents. Petitioner's requests for rehearing and rehearing en banc were denied. 479 F. 2d, at 1020.

Thus, after six and one-half years and three published decisions, the Court of Appeals endorsed the conclusion reached by the District Court in its original order in 1966—that petitioner's suit could not proceed as a class action. In its procedural history, at least, this litigation has lived up to Judge Lumbard's characterization of it as a "Frankenstein monster posing as a class action." *Eisen II*, 391 F. 2d, at 572.

II

At the outset we must decide whether the Court of Appeals in *Eisen III* had jurisdiction to review the District Court's orders permitting the suit to proceed as a class action and allocating the cost of notice. Petitioner contends that it did not. Respondents counter by asserting two independent bases for appellate jurisdiction: first, that the orders in question constituted a "final"

decision within the meaning of 28 U. S. C. § 1291 [8] and were therefore appealable as of right under that section; and, second, that the Court of Appeals in *Eisen II* expressly retained jurisdiction pending further development of a factual record on remand and that consequently no new jurisdictional basis was required for the decision in *Eisen III*. Because we agree with the first ground asserted by respondents, we have no occasion to consider the second.

Restricting appellate review to "final decisions" prevents the debilitating effect on judicial administration caused by piecemeal appellate disposition of what is, in practical consequence, but a single controversy. While the application of § 1291 in most cases is plain enough, determining the finality of a particular judicial order may pose a close question. No verbal formula yet devised can explain prior finality decisions with unerring accuracy or provide an utterly reliable guide for the future.[9] We know, of course, that § 1291 does not

[8] Section 1291 provides:

"The courts of appeals shall have jurisdiction of appeals from all final decisions of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, except where a direct review may be had in the Supreme Court."

[9] As long ago as 1892 the Court complained: "Probably no question of equity practice has been the subject of more frequent discussion in this court than the finality of decrees. . . . The cases, it must be conceded, are not altogether harmonious." *McGourkey* v. *Toledo & Ohio R. Co.*, 146 U. S. 536, 544–545. In the intervening years the difficulty of resolving such questions has not abated. As Mr. Justice Black commented in *Gillespie* v. *U. S. Steel Corp.*, 379 U. S. 148, 152 (1964), "whether a ruling is 'final' within the meaning of § 1291 is frequently so close a question that decision of that issue either way can be supported with equally forceful arguments, and . . . it is impossible to devise a formula to resolve all marginal cases coming within what might well be called the 'twilight zone' of finality."

limit appellate review to "those final judgments which terminate an action . . . ," *Cohen* v. *Beneficial Loan Corp.*, 337 U. S., at 545, but rather that the requirement of finality is to be given a "practical rather than a technical construction." *Id.*, at 546. The inquiry requires some evaluation of the competing considerations underlying all questions of finality—"the inconvenience and costs of piecemeal review on the one hand and the danger of denying justice by delay on the other." *Dickinson* v. *Petroleum Conversion Corp.*, 338 U. S. 507, 511 (1950) (footnote omitted).

We find the instant case controlled by our decision in *Cohen* v. *Beneficial Loan Corp., supra.* There the Court considered the applicability in a federal diversity action of a forum state statute making the plaintiff in a stockholder's derivative action liable for litigation expenses, if ultimately unsuccessful, and entitling the corporation to demand security in advance for their payment. The trial court ruled the statute inapplicable, and the corporation sought immediate appellate review over the stockholder's objection that the order appealed from was not final. This Court held the order appealable on two grounds. First, the District Court's finding was not "tentative, informal or incomplete," 337 U. S., at 546, but settled conclusively the corporation's claim that it was entitled by state law to require the shareholder to post security for costs. Second, the decision did not constitute merely a "step toward final disposition of the merits of the case . . . ." *Ibid.* Rather, it concerned a collateral matter that could not be reviewed effectively on appeal from the final judgment. The Court summarized its conclusion in this way:

> "This decision appears to fall in that small class which finally determine claims of right separable from, and collateral to, rights asserted in the action,

too important to be denied review and too independent of the cause itself to require that appellate consideration be deferred until the whole case is adjudicated." *Ibid.*

Analysis of the instant case reveals that the District Court's order imposing 90% of the notice costs on respondents likewise falls within "that small class." It conclusively rejected respondents' contention that they could not lawfully be required to bear the expense of notice to the members of petitioner's proposed class. Moreover, it involved a collateral matter unrelated to the merits of petitioner's claims. Like the order in *Cohen*, the District Court's judgment on the allocation of notice costs was "a final disposition of a claimed right which is not an ingredient of the cause of action and does not require consideration with it," *id.*, at 546–547, and it was similarly appealable as a "final decision" under § 1291. In our view the Court of Appeals therefore had jurisdiction to review fully the District Court's resolution of the class action notice problems in this case, for that court's allocation of 90% of the notice costs to respondents was but one aspect of its effort to construe the requirements of Rule 23 (c)(2) in a way that would permit petitioner's suit to proceed as a class action.[10]

III

Turning to the merits of the case, we find that the District Court's resolution of the notice problems was

[10] As explained in Part III of this opinion, we find the notice requirements of Rule 23 to be dispositive of petitioner's attempt to maintain the class action as presently defined. We therefore have no occasion to consider whether the Court of Appeals correctly resolved the issues of manageability and fluid-class recovery, or indeed, whether those issues were properly before the Court of Appeals under the theory of retained jurisdiction.

erroneous in two respects. First, it failed to comply with the notice requirements of Rule 23 (c)(2), and second, it imposed part of the cost of notice on respondents.

A

Rule 23 (c)(2) provides that, in any class action maintained under subdivision (b)(3), each class member shall be advised that he has the right to exclude himself from the action on request or to enter an appearance through counsel, and further that the judgment, whether favorable or not, will bind all class members not requesting exclusion. To this end, the court is required to direct to class members "the best notice practicable under the circumstances, *including individual notice to all members who can be identified through reasonable effort.*" [11] We think the import of this language is unmistakable. Individual notice must be sent to all class members whose names and addresses may be ascertained through reasonable effort.

The Advisory Committee's Note to Rule 23 reinforces this conclusion. See 28 U. S. C. App., p. 7765. The Advisory Committee described subdivision (c)(2) as "not merely discretionary" and added that the "mandatory notice pursuant to subdivision (c)(2) . . . is designed to fulfill requirements of due process to which the class action procedure is of course subject." *Id.*, at 7768. The

[11] Emphasis added. Subdivision (c)(2) provides in full:

"(2) In any class action maintained under subdivision (b)(3), the court shall direct to the members of the class the best notice practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort. The notice shall advise each member that (A) the court will exclude him from the class if he so requests by a specified date; (B) the judgment, whether favorable or not, will include all members who do not request exclusion; and (C) any member who does not request exclusion may, if he desires, enter an appearance through his counsel."

Committee explicated its incorporation of due process standards by citation to *Mullane* v. *Central Hanover Bank & Trust Co.*, 339 U. S. 306 (1950), and like cases.

In *Mullane* the Court addressed the constitutional sufficiency of publication notice rather than mailed individual notice to known beneficiaries of a common trust fund as part of a judicial settlement of accounts. The Court observed that notice and an opportunity to be heard were fundamental requisites of the constitutional guarantee of procedural due process. It further stated that notice must be "reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." *Id.*, at 314. The Court continued:

> "But when notice is a person's due, process which is a mere gesture is not due process. The means employed must be such as one desirous of actually informing the absentee might reasonably adopt to accomplish it. The reasonableness and hence the constitutional validity of any chosen method may be defended on the ground that it is in itself reasonably certain to inform those affected." *Id.*, at 315.

The Court then held that publication notice could not satisfy due process where the names and addresses of the beneficiaries were known.[12] In such cases, "the reasons

[12] The Court's discussion of the inadequacies of published notice bears attention:

"It would be idle to pretend that publication alone, as prescribed here, is a reliable means of acquainting interested parties of the fact that their rights are before the courts. . . . Chance alone brings to the attention of even a local resident an advertisement in small type inserted in the back pages of a newspaper, and if he makes his home outside the area of the newspaper's normal circulation the odds that the information will never reach him are large indeed. The chance of actual notice is further reduced when, as here, the

disappear for resort to means less likely than the mails to apprise them of [an action's] pendency." *Id.*, at 318.

In *Schroeder* v. *City of New York*, 371 U. S. 208 (1962), decided prior to the promulgation of amended Rule 23, the Court explained that *Mullane* required rejection of notice by publication where the name and address of the affected person were available. The Court stated that the "general rule" is that "notice by publication is not enough with respect to a person whose name and address are known or very easily ascertainable . . . ." *Id.*, at 212–213. The Court also noted that notice by publication had long been recognized as a poor substitute for actual notice and that its justification was " 'difficult at best.' " *Id.*, at 213.

Viewed in this context, the express language and intent of Rule 23 (c)(2) leave no doubt that individual notice must be provided to those class members who are identifiable through reasonable effort. In the present case, the names and addresses of 2,250,000 class members are easily ascertainable, and there is nothing to show that individual notice cannot be mailed to each. For these class members, individual notice is clearly the "best notice practicable" within the meaning of Rule 23 (c)(2) and our prior decisions.

Petitioner contends, however, that we should dispense with the requirement of individual notice in this case, and he advances two reasons for our doing so. First, the prohibitively high cost of providing individual notice to 2,250,000 class members would end this suit as a class action and effectively frustrate petitioner's attempt to vindicate the policies underlying the antitrust and se-

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notice required does not even name those whose attention it is supposed to attract, and does not inform acquaintances who might call it to attention." 339 U. S., at 315.

curities laws. Second, petitioner contends that individual notice is unnecessary in this case, because no prospective class member has a large enough stake in the matter to justify separate litigation of his individual claim. Hence, class members lack any incentive to opt out of the class action even if notified.

The short answer to these arguments is that individual notice to identifiable class members is not a discretionary consideration to be waived in a particular case. It is, rather, an unambiguous requirement of Rule 23. As the Advisory Committee's Note explained, the Rule was intended to insure that the judgment, whether favorable or not, would bind all class members who did not request exclusion from the suit. 28 U. S. C. App., pp. 7765, 7768. Accordingly, each class member who can be identified through reasonable effort must be notified that he may request exclusion from the action and thereby preserve his opportunity to press his claim separately or that he may remain in the class and perhaps participate in the management of the action. There is nothing in Rule 23 to suggest that the notice requirements can be tailored to fit the pocketbooks of particular plaintiffs.[13]

Petitioner further contends that adequate representation, rather than notice, is the touchstone of due process in a class action and therefore satisfies Rule 23. We think this view has little to commend it. To begin with, Rule 23 speaks to notice as well as to adequacy of representation and requires that both be provided. Moreover, petitioner's argument proves too much, for it

[13] Petitioner also argues that class members will not opt out because the statute of limitations has long since run out on the claims of all class members other than petitioner. This contention is disposed of by our recent decision in *American Pipe & Construction Co.* v. *Utah*, 414 U. S. 538 (1974), which established that commencement of a class action tolls the applicable statute of limitations as to all members of the class.

quickly leads to the conclusion that no notice at all, published or otherwise, would be required in the present case. This cannot be so, for quite apart from what due process may require, the command of Rule 23 is clearly to the contrary. We therefore conclude that Rule 23 (c)(2) requires that individual notice be sent to all class members who can be identified with reasonable effort.[14]

B

We also agree with the Court of Appeals that petitioner must bear the cost of notice to the members of his class. The District Court reached the contrary conclusion and imposed 90% of the notice cost on respondents. This decision was predicated on the court's finding, made after a preliminary hearing on the merits of the case, that petitioner was "more than likely" to prevail on his claims. Apparently, that court interpreted Rule 23 to authorize such a hearing as part of the determination whether a suit may be maintained as a class action. We disagree.

We find nothing in either the language or history of Rule 23 that gives a court any authority to conduct a preliminary inquiry into the merits of a suit in order to determine whether it may be maintained as a class action. Indeed, such a procedure contravenes the Rule by allowing a representative plaintiff to secure the benefits of a class action without first satisfying the requirements for it. He is thereby allowed to obtain a determination on the merits of the claims advanced on

[14] We are concerned here only with the notice requirements of subdivision (c)(2), which are applicable to class actions maintained under subdivision (b)(3). By its terms subdivision (c)(2) is inapplicable to class actions for injunctive or declaratory relief maintained under subdivision (b)(2). Petitioner's effort to qualify his suit as a class action under subdivisions (b)(1) and (b)(2) was rejected by the Court of Appeals. See n. 4, *supra*.

behalf of the class without any assurance that a class action may be maintained. This procedure is directly contrary to the command of subdivision (c)(1) that the court determine whether a suit denominated a class action may be maintained as such "[a]s soon as practicable after the commencement of [the] action . . . ." In short, we agree with Judge Wisdom's conclusion in *Miller* v. *Mackey International,* 452 F. 2d 424 (CA5 1971), where the court rejected a preliminary inquiry into the merits of a proposed class action:

> "In determining the propriety of a class action, the question is not whether the plaintiff or plaintiffs have stated a cause of action or will prevail on the merits, but rather whether the requirements of Rule 23 are met." *Id.,* at 427.

Additionally, we might note that a preliminary determination of the merits may result in substantial prejudice to a defendant, since of necessity it is not accompanied by the traditional rules and procedures applicable to civil trials. The court's tentative findings, made in the absence of established safeguards, may color the subsequent proceedings and place an unfair burden on the defendant.

In the absence of any support under Rule 23, petitioner's effort to impose the cost of notice on respondents must fail. The usual rule is that a plaintiff must initially bear the cost of notice to the class. The exceptions cited by the District Court related to situations where a fiduciary duty pre-existed between the plaintiff and defendant, as in a shareholder derivative suit.[15] Where, as here, the relationship between the parties is truly ad-

[15] See, *e. g., Dolgow* v. *Anderson,* 43 F. R. D. 472, 498–500 (EDNY 1968). We, of course, express no opinion on the proper allocation of the cost of notice in such cases.

versary, the plaintiff must pay for the cost of notice as part of the ordinary burden of financing his own suit.

Petitioner has consistently maintained, however, that he will not bear the cost of notice under subdivision (c)(2) to members of the class as defined in his original complaint. See 479 F. 2d, at 1008; 52 F. R. D., at 269. We therefore remand the cause with instructions to dismiss the class action as so defined.[16]

The judgment of the Court of Appeals is vacated and the cause remanded for proceedings consistent with this opinion.

It is so ordered.

MR. JUSTICE DOUGLAS, with whom MR. JUSTICE BRENNAN and MR. JUSTICE MARSHALL concur, dissenting in part.

While I am in general agreement with the phases of this case touched on by the Court, I add a few words because its opinion does not fully explore the issues which will be dispositive of this case on remand to the District Court.

Federal Rule Civ. Proc. 23 (c)(4) provides: "When appropriate (A) an action may be brought or maintained as a class action with respect to particular issues, or (B) a class may be divided into subclasses and each subclass treated as a class, and the provisions of this rule shall then be construed and applied accordingly."

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[16] The record does not reveal whether a smaller class of odd-lot traders could be defined, and if so, whether petitioner would be willing to pay the cost of notice to members of such a class. We intimate no view on whether any such subclass would satisfy the requirements of Rule 23. We do note, however, that our dismissal of the class action as originally defined is without prejudice to any efforts petitioner may make to redefine his class either under Rule 23 (c)(4) or Fed. Rule Civ. Proc. 15.

As Judge Oakes, speaking for himself and Judge Timbers, said below:

> "The plaintiff class might, for example, be divided into much smaller subclasses . . . of odd lot buyers for particular periods, and one subclass treated as a test case, with the other subclasses held in abeyance. Individual notice at what would probably be a reasonable cost could then be given to all members of the particular small subclass who can be easily identified." 479 F. 2d 1005, 1023 (dissenting from denial of rehearing en banc).

Or a subclass might include those on monthly investment plans, or payroll deduction plans run by brokerage houses.[1] The possibilities, though not infinite, are numerous.

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[1] The parties and courts below concentrated on whether a class action could be sustained on behalf of all six million odd-lot investors, so that the record is limited in information bearing on what manageable subclasses could be created.

There is, nonetheless, indication that certain subclasses might be economically manageable. Counsel for respondent Carlisle & Jacquelin stated in oral argument before the Court of Appeals that 100,000 shareholders participate in his client's Monthly Investment Plan, and that Carlisle & Jacquelin corresponds with those investors. Merrill Lynch corresponds with 150,000 people participating in a payroll deduction investment plan. Whether Eisen or any other plaintiff who may come forward to intervene fits in such a subclass, we do not know. But if brokerage houses correspond regularly in the course of business with such odd-lot investors, the marginal cost of providing the individual notice required by Rule 23 (c) (2) might be nothing more than printing and stuffing an additional sheet of paper in correspondence already being sent to the investor, or perhaps only programing a computer to type an additional paragraph at the bottom of monthly or quarterly statements regularly mailed by the brokers.

A subclass of those who had engaged in numerous transactions might also be defined, so that the recovery per class member might be large enough to justifiy the cost of notice and management of the

The power to create a subclass is clear and unambiguous. Who should be included and how large it should be are questions that only the District Court should resolve. Notice to each member of the subclass would be essential under Rule 23 (c)(2); and under Rule 23 (c)(2)(A) any notified member may opt out. There would remain the question whether the subclass suit is manageable. But since the subclass could be chosen in light of the nonmanageability of the size of the class whose claims are presently before us, there is no apparent difficulty in that sense.

The statute of limitations, it is argued, has run or is about to run on many of these classes. We held in *American Pipe & Construction Co.* v. *Utah*, 414 U. S. 538, that the start of a class action prior to the running of the statute protects all members of the class. Whether that rule should obtain for the benefit of other members who could have been included in the subclass bringing suit, but for the manageability issue, is a question we have not decided.[2] Moreover, if the subclass sues and wins or

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action. A survey of only four of 14 wire firms revealed 2,000 customers with 10 or more transactions between 1962 and 1966. 52 F. R. D. 253, 259, 267, and n. 10.

By defining more definite subclasses such as those discussed, moreover, the problems inherent in distributing an eventual judgment would be reduced. Class members would be more readily identifiable, with more readily accessible transaction records and individually provable damages.

[2] In this case, the entire class was defined in the original complaint, and the defendants were put on notice within the period of limitation of their potential liability, serving the purpose of the statute of limitations even if the substantive merits were eventually to be prosecuted in the form of a subclass action with the class action held in abeyance. "Within the period set by the statute of limitations, the defendants have the essential information necessary to determine both the subject matter and size of the prospective litigation, whether the actual trial is conducted in the form of a class action, as a joint suit, or as a principal suit with additional inter-

sues and loses, questions covering the rights of members of the larger class who are not parties would be raised. These are questions we have not answered.[3] But the fact that unresolved questions of law would remain is not an insurmountable obstacle, and Rule 23 (c)(4)(B) expressly authorizes subclasses to sue in lieu of a full class. Rule 23 (c)(4)(B) may have had, as a forerunner, the proposal stated by Judge Weinstein in 1960:

> "When there is a question of law or fact common to persons of a numerous class whose joinder is impracticable, one or more of them whose claims or defenses are representative of the claims or defenses of all and who will fairly and adequately protect the interests of all may sue or be sued on behalf of all." [4]

In explanation he added:

> "Such a rule would provide six requirements for a class action: (1) a class, (2) numerous members,

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venors." *American Pipe & Construction Co.* v. *Utah*, 414 U. S. 538, 555. And see Wheaton, Representative Suits Involving Numerous Litigants, 19 Cornell L. Q. 399, 423 (1934).

[3] If the subclass lost, it is argued that other investors not members of that subclass could not be precluded from prosecuting successful suits of their own, since they had never had their day in court or necessarily even been apprised of the subclass' action. See *Hansberry* v. *Lee*, 311 U. S. 32; F. James, Civil Procedure § 11.26 (1965); 1B J. Moore, Federal Practice ¶ 0.411 [1] (1974). If the subclass won, strict application of the doctrine of mutuality of estoppel would limit the usefulness of that subclass victory in suits brought by investors not members of that subclass. See generally F. James, *supra*, § 11.31; 1B J. Moore, *supra*, ¶ 0.412 [1] (and Supp. 1973), and cases cited therein. And see Vestal, Preclusion/Res Judicata Variables: Parties, 50 Iowa L. Rev. 27, 55–59 (1964); Note, 35 Geo. Wash. L. Rev. 1010 (1967); Currie, Mutuality of Collateral Estoppel: Limits of the *Bernhard* Doctrine, 9 Stan. L. Rev. 281 (1957).

[4] Weinstein, Revision of Procedure: Some Problems in Class Actions, 9 Buffalo L. Rev. 433, 458.

(3) common question of law or fact, (4) impracticability of joinder, (5) representative claim or defense, (6) fair and adequate protection of absentees.

"Almost any 'bond of association' in an event or status out of which a legal dispute arose is sufficient to constitute a class. The class must be numerous but need not be so large that, in itself, this factor makes it impracticable to bring them all before the court. A number of members sufficient to satisfy present Section 195 [of the New York Civil Practice Act] would satisfy the proposed rule. Size, modesty of monetary interest, inability to locate members and difficulty of obtaining jurisdiction should all be considered in determining impracticability of joinder." [5]

The Court permits Eisen to redefine his class either by amending his complaint pursuant to Fed. Rule Civ. Proc. 15, or by proceeding under Rule 23 (c)(4). While Eisen may of course proceed by amending his complaint to define a subclass, it is clear that he need not do so.[6] Definition of the subclass would properly be accomplished by order of the District Court, as permitted by Rules 23 (c)(4) and 23 (c)(1), without amendment of the complaint as filed. While the complaint alleges that

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[5] *Id.*, at 458–459 (footnotes omitted).

[6] Were Eisen to be remitted to an individual action, as he would be if he refused to pay the cost of notice even to a subclass, amendment of the complaint might be called for by the District Court. Under Rule 23 (d)(4), the District Court may in some instances require that pleadings be amended to eliminate class allegations. The Advisory Committee Notes indicate that this provision is to be applied only when a suit must proceed as a nonclass, individual action, not when, as here, an appropriate class exists and the action must be prosecuted in the first instance by a subclass only because of problems of manageability. See 28 U. S. C. App., p. 7767.

Eisen sues on his behalf and on behalf of all purchasers and sellers of odd lots, it adds, "Plaintiff will fairly insure the adequate representation of all such persons." Problems of manageability covered by Rule 23 (b)(3)(D) arise only after issues are joined and the District Court is engaged in shaping up the litigation for a trial on the merits. If it finds that a subclass would be more appropriate, no new action need be started nor any amended complaint filed.

Rule 23 (c)(1) provides: "As soon as practicable after the commencement of an action brought as a class action, the court shall determine by order whether it is to be so maintained. An order under this subdivision may be conditional, and may be altered or amended before the decision on the merits."

It is as plain as words can make it that the court which decides that a full class action can be maintained can alter or amend its order "before the decision on the merits." One permissible way in which the court's order may be changed is to have it "altered" as provided in Rule 23 (c)(1) by reducing the larger class to a subclass as provided in the same subsection—Rule 23 (c)(4)(B). The prerequisites of a class cause of action are described in Rule 23 (a). In the instant case that hurdle has been passed and we are at the stage of notice requirements and manageability. Not an iota of change is made in the cause of action by restricting it to a subclass.

The purpose of Rule 23 is to provide flexibility in the management of class actions, with the trial court taking an active role in the conduct of the litigation. See *Dolgow* v. *Anderson*, 43 F. R. D. 472, 481–482 (EDNY); *Green* v. *Wolf Corp.*, 406 F. 2d 291, 298 (CA2), cert. denied, 395 U. S. 977. Lower federal courts have recognized their discretion to define those subclasses proper to prosecute an action without being bound by the plaintiff's

complaint. See, *e. g.*, *Dolgow* v. *Anderson*, *supra*, at 491–493; *Philadelphia Elec. Co.* v. *Anaconda American Brass Co.*, 43 F. R. D. 452, 462–463 (ED Pa.). See generally 7A C. Wright & A. Miller, Federal Practice and Procedure § 1790, p. 187; 3B J. Moore, Federal Practice ¶ 23.65. And, as Rule 23 (c)(1) clearly indicates, the courts retain both the power and the duty to realign classes during the conduct of an action when appropriate. See, *e. g.*, *Carr* v. *Conoco Plastics, Inc.*, 423 F. 2d 57, 58 (CA5), cert. denied, 400 U. S. 951; *Johnson* v. *ITT-Thompson Industries, Inc.*, 323 F. Supp. 1258, 1262 (ND Miss.); *Ostapowicz* v. *Johnson Bronze Co.*, 54 F. R. D. 465, 466 (WD Pa.); *Baxter* v. *Savannah Sugar Refining Corp.*, 46 F. R. D. 56, 60 (SD Ga.). That discretion can be fully retained only if the full-class complaint is preserved when a subclass is defined to prosecute the action. The bounds of the subclass can then be narrowed or widened by order of the District Court as provided in Rule 23 (c)(1), without need to amend the complaint and without the constraints which might exist if the complaint had earlier been amended pursuant to Rule 15 to include only the subclass.

I agree with Professor Chafee that a class action serves not only the convenience of the parties but also prompt, efficient judicial administration.[7] I think in our society that is growing in complexity there are bound to be innumerable people in common disasters, calamities, or ventures who would go begging for justice without the class action but who could with all regard to due process be protected by it. Some of these are consumers whose claims may seem *de minimis* but who alone have no practical recourse for either remuneration or injunctive relief. Some may be environmentalists who have no photographic development plant about to be ruined because of

[7] Z. Chafee, Some Problems of Equity 149 (1950).

air pollution by radiation but who suffer perceptibly by smoke, noxious gases, or radiation. Or the unnamed individual may be only a ratepayer being excessively charged by a utility, or a homeowner whose assessment is slowly rising beyond his ability to pay.

The class action is one of the few legal remedies the small claimant has against those who command the status quo.[8] I would strengthen his hand with the view of creating a system of law that dispenses justice to the lowly as well as to those liberally endowed with power and wealth.

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[8] Judge Weinstein writing in the N. Y. Law Journal, May 2, 1972, p. 4, col. 3, said:

"Where, however, public authorities are remiss in performance of this responsibility for reason of inadequate legal authority, excessive workloads or simple indifference, class actions may provide a necessary temporary measure until desirable corrections have occurred. The existence of class action litigation may also play a substantial role in bringing about more efficient administrative enforcement and in inducing legislative action.

"The matter touches on the issue of the credibility of our judicial system. Either we are committed to make reasonable efforts to provide a forum for adjudication of disputes involving all our citizens—including those deprived of human rights, consumers who overpay for products because of antitrust violations and investors who are victimized by insider trading or misleading information—or we are not. There are those who will not ignore the irony of courts ready to imprison a man who steals some goods in interstate commerce while unwilling to grant a civil remedy against the corporation which has benefited, to the extent of many millions of dollars, from collusive, illegal pricing of its goods to the public.

"When the organization of a modern society, such as ours, affords the possibility of illegal behavior accompanied by widespread, diffuse consequences, some procedural means must exist to remedy—or at least to deter—that conduct."

HOLDER, U. S. DISTRICT JUDGE *v.* BANKS

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

No. 73–841. Argued April 24, 1974—Decided May 28, 1974

Certiorari dismissed as improvidently granted.

Karl J. Stipher argued the cause for petitioner. With him on the brief were *Frederick P. Bamberger, Harold H. Bredell, John E. Early, Erle A. Kightlinger, R. M. Kroger, C. Wendell Martin, James L. Miller, Wayne C. Ponader, Floyd W. Burns, C. B. Dutton, Thomas M. Scanlon, Ben J. Weaver, Howard S. Young, Jr.,* and *Norman P. Rowe.*

Morton Stavis argued the cause for respondent. With him on the brief were *William M. Kunstler* and *Doris Peterson.**

PER CURIAM.

The writ of certiorari is dismissed as improvidently granted.

MR. JUSTICE POWELL took no part in the consideration or decision of this case.

**Melvin L. Wulf, Leon Friedman,* and *Joel M. Gora* filed a brief for the American Civil Liberties Union et al. as *amici curiae* urging affirmance.

CORNING GLASS WORKS *v.* BRENNAN, SECRETARY OF LABOR

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

No. 73-29. Argued March 25, 1974—Decided June 3, 1974*

Male employees at the Corning Glass Works (Corning) previously performed night shift inspection and were paid more than females, who performed the day shift inspection. A plantwide shift differential that subsequently came with unionization was superimposed on the existing base-wage difference between male night inspectors and female day inspectors. Thereafter, beginning June 1, 1966, Corning began to open up night shift jobs for women, who on an equal seniority basis with men were able to bid for the higher paid night inspection jobs as vacancies occurred. On January 20, 1969, a new "job evaluation" system for setting wage rates took effect, under which all subsequently hired inspectors were to receive the same base wage (which was higher than the previous night shift rate) regardless of sex or shift. Employees hired before that date, however, when working night shift were to continue to receive a higher ("red circle") rate, thus perpetuating the previous differential in base pay between day and night inspectors. The Secretary of Labor brought these actions for backpay and injunctive relief against Corning, claiming that violations of the Equal Pay Act of 1963 had occurred at its Corning, N. Y. (No. 73-29), and Wellsboro, Pa. (No. 73-695), plants. In No. 73-29, the District Court granted relief, and the Court of Appeals for the Second Circuit affirmed, concluding that Corning's practice violated the Act, while the District Court in No. 73-695 held that the Act had not been violated, and the Court of Appeals for the Third Circuit affirmed. In order to establish a violation of the Act, it must be shown that an employer pays different wages to employees of opposite sexes "for equal work on jobs the performance of which requires equal skill, effort, and responsibility, and which are performed under similar working condi-

*Together with No. 73-695, *Brennan, Secretary of Labor* v. *Corning Glass Works*, on certiorari to the Court of Appeals for the Third Circuit.

tions," except where the difference in payment is made pursuant to a seniority or merit system or one measuring earnings by quantity or quality of production, or where the differential is "based on any other factor other than sex." *Held:*

1. Corning violated the Act during the period from its effective date to June 1966. Pp. 195–205.

(a) The statutory term "working conditions," as is clear from the Act's legislative history, encompasses only physical surroundings and hazards and not the time of day worked. Pp. 197–204.

(b) The record amply supports the conclusion of the District Court in No. 73–29 that Corning had not sustained its burden of proof that the higher base wage for pre-June 1966 all-male night inspection work was in fact intended to serve as added compensation for night work, and thus was based on a "factor other than sex." Substantial evidence showed that the differential arose simply because men would not work at the low rates paid women inspectors and reflected a job market in which Corning could pay women less than men for the same work. Pp. 204–205.

2. Corning did not cure its violation in June 1966 by permitting women to work as night shift inspectors, since the violation could not have been cured except by equalizing the base wages of female day inspectors with the higher rates paid the night inspectors Pp. 205–208.

3. The violation was not cured in 1969, when Corning equalized day and night inspector wage rates, since the "red circle" rate perpetuated the discrimination. Pp. 208–210.

No. 73–29, 474 F. 2d 226, affirmed; No. 73–695, 480 F. 2d 1254, reversed and remanded.

MARSHALL, J., delivered the opinion of the Court, in which DOUGLAS, BRENNAN, WHITE, and POWELL, JJ., joined. BURGER, C. J., and BLACKMUN and REHNQUIST, JJ., filed a dissenting statement, *post*, p. 210. STEWART, J., took no part in the consideration or decision of the cases.

Scott F. Zimmerman argued the cause for petitioner in No. 73–29 and for respondent in No. 73–695. With him on the briefs was *Walter P. DeForest III.*

Allan Abbot Tuttle argued the cause for petitioner in No. 73–695 and for respondent in No. 73–29. With him on the brief were *Solicitor General Bork, Deputy Solici-*

tor General Wallace, Sylvia S. Ellison, and *Helen W. Judd.*†

MR. JUSTICE MARSHALL delivered the opinion of the Court.

These cases arise under the Equal Pay Act of 1963, 77 Stat. 56, § 3, 29 U. S. C. § 206 (d)(1),[1] which added to § 6 of the Fair Labor Standards Act of 1938 the principle of equal pay for equal work regardless of sex. The principal question posed is whether Corning Glass Works violated the Act by paying a higher base wage to male night shift inspectors than it paid to female inspectors performing the same tasks on the day shift, where the higher wage was paid in addition to a separate night shift differential paid to all employees for night work. In No. 73–29, the Court of Appeals for the Second Circuit, in a case involving several Corning plants in Corning, New York, held that this practice vio-

†Briefs of *amici curiae* were filed in both cases by *Milton Smith, Gerard C. Smetana, Lawrence D. Ehrlich,* and *Jerry Kronenberg* for the Chamber of Commerce of the United States, and by *Ruth Bader Ginsburg* and *Melvin L. Wulf* for the American Civil Liberties Union et al.

[1] "No employer having employees subject to any provisions of this section shall discriminate, within any establishment in which such employees are employed, between employees on the basis of sex by paying wages to employees in such establishment at a rate less than the rate at which he pays wages to employees of the opposite sex in such establishment for equal work on jobs the performance of which requires equal skill, effort, and responsibility, and which are performed under similar working conditions, except where such payment is made pursuant to (i) a seniority system; (ii) a merit system; (iii) a system which measures earnings by quantity or quality of production; or (iv) a differential based on any other factor other than sex: *Provided,* That an employer who is paying a wage rate differential in violation of this subsection shall not, in order to comply with the provisions of this subsection, reduce the wage rate of any employee."

lated the Act. 474 F. 2d 226 (1973). In No. 73–695, the Court of Appeals for the Third Circuit, in a case involving a Corning plant in Wellsboro, Pennsylvania, reached the opposite conclusion. 480 F. 2d 1254 (1973). We granted certiorari and consolidated the cases to resolve this unusually direct conflict between two circuits. 414 U. S. 1110 (1973). Finding ourselves in substantial agreement with the analysis of the Second Circuit, we affirm in No. 73–29 and reverse in No. 73–695.

I

Prior to 1925, Corning operated its plants in Wellsboro and Corning only during the day, and all inspection work was performed by women. Between 1925 and 1930, the company began to introduce automatic production equipment which made it desirable to institute a night shift. During this period, however, both New York and Pennsylvania law prohibited women from working at night.[2] As a result, in order to fill inspector positions on the new night shift, the company had to recruit male employees from among its male dayworkers. The male employees so transferred demanded and received wages substantially higher than those paid to women inspectors engaged on the two day shifts.[3] During this same period, however,

[2] New York prohibited the employment of women between 10 p. m. and 6 a. m. See 1927 N. Y. Laws, c. 453; 1930 N. Y. Laws, c. 868. Pennsylvania also prohibited them from working between 10 p. m. and 6 a. m. See Act of July 25, 1913, Act No. 466, Pa. Laws 1913.

[3] Higher wages were demanded in part because the men had been earning more money on their day shift jobs than women were paid for inspection work. Thus, at the time of the creation of the new night shift, female day shift inspectors received wages ranging from 20 to 30 cents per hour. Most of the men designated to fill the newly created night shift positions had been working in the blowing room where the lowest wage rate was 48 cents per hour and where additional incentive pay could be earned. As night shift inspectors these men received 53 cents per hour. There is also some evidence

no plant-wide shift differential existed and male employees working at night, other than inspectors, received the same wages as their day shift counterparts. Thus a situation developed where the night inspectors were all male,[4] the day inspectors all female, and the male inspectors received significantly higher wages.

In 1944, Corning plants at both locations were organized by a labor union and a collective-bargaining agreement was negotiated for all production and maintenance employees. This agreement for the first time established a plant-wide shift differential,[5] but this change did not eliminate the higher base wage paid to male night inspectors. Rather, the shift differential was superimposed on the existing difference in base wages between male night inspectors and female day inspectors.

Prior to June 11, 1964, the effective date of the Equal Pay Act,[6] the law in both Pennsylvania and New York

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in the record that additional compensation was necessary because the men viewed inspection jobs as "demeaning" and as "women's work."

[4] A temporary exception was made during World War II when manpower shortages caused Corning to be permitted to employ women on the steady night shift inspection jobs at both locations. It appears that women night inspectors during this period were paid the same higher night shift wages earned by the men.

[5] The shift differential was originally three cents an hour for the afternoon shift and five cents an hour for the night shift. It has been increased to 10 and 16 cents per hour respectively.

[6] Section 4 of the Equal Pay Act provided that the Act would take effect upon the expiration of one year from June 10, 1963, the date of its enactment, except that in the case of employees covered by a bona fide collective-bargaining agreement in effect at least 30 days prior to the date of enactment, the Act would take effect upon the termination of such collective-bargaining agreement. It is conceded that the Act became effective with respect to the Corning, New York, plants on June 11, 1964, though it is also stipulated that the statute of limitations barred all claims for backpay prior to November 1, 1964. With respect to the Wellsboro plant, there is

was amended to permit women to work at night.[7] It was not until some time after the effective date of the Act, however, that Corning initiated efforts to eliminate

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apparently some dispute between the company and the Secretary as to when the Act took effect. Corning evidently believes the Act took effect on January 20, 1965, because of an outstanding collective-bargaining agreement. The Secretary claims that this agreement was reopened on January 24, 1964, and that the plant therefore became subject to the Act's requirements on June 11, 1964, one year after enactment. We see no need to resolve this question as it appears that, in any event, the parties agree the statute of limitations bars recovery of back wages for any violation prior to October 1966.

[7] In New York, a 1953 amendment allowed females over the age of 21 to work after midnight in factories operating multiple shifts where the Industrial Commissioner found transportation and safety conditions to be satisfactory and granted approval. See 1953 N. Y. Laws, c. 708, amending N. Y. Labor Law § 172, formerly codified in N. Y. Labor Law § 173 (3)(a)(1) (1965). In Pennsylvania, the law was amended in 1947 to permit women to work at night conditioned upon the approval of the State Department of Labor and Industry, Pa. Laws 1947, Act No. 543, p. 1397, codified in Pa. Stat. Ann., Tit. 43, § 104 (Supp. 1974–1975), but state regulations required that, in order to obtain approval to employ women at night, an employer was required to furnish transportation where public transportation was not available. The District Court in No. 73–695 found that public transportation was not available in Wellsboro and that it was not economically feasible for Corning to furnish transportation for its female employees. In July 1965, however, the Pennsylvania regulations were amended to permit employers to hire women at night where regular private transportation is available. Pa. Dept. of Labor and Industry, Regulations Relating to Hours of Work and Conditions of Employment of Women in Pa., Rule S–8 (c) (1966).

In 1969, both New York and Pennsylvania repealed, either expressly or by implication, those special night-work restrictions for women cited above. See 2 N. Y. Laws 1969, c. 1042, § 2, p. 2630, repealing N. Y. Labor Law § 173.3.a (1) (1965) and replacing it with § 177.1 (c), which was subsequently repealed in 1973, 1 N. Y. Laws 1973, c. 377, § 11, p. 1336; Pa. Laws 1969, Act No. 56, p. 133, which, by including sex as a prohibited form of discrimination, Pa.

the differential rates for male and female inspectors. Beginning in June 1966, Corning started to open up jobs on the night shift to women. Previously separate male and female seniority lists were consolidated and women became eligible to exercise their seniority, on the same basis as men, to bid for the higher paid night inspection jobs as vacancies occurred.

On January 20, 1969, a new collective-bargaining agreement went into effect, establishing a new "job evaluation" system for setting wage rates. The new agreement abolished for the future the separate base wages for day and night shift inspectors and imposed a uniform base wage for inspectors exceeding the wage rate for the night shift previously in effect. All inspectors hired after January 20, 1969, were to receive the same base wage, whatever their sex or shift. The collective-bargaining agreement further provided, however, for a higher "red circle" rate for employees hired prior to January 20, 1969, when working as inspectors on the night shift. This "red circle" rate served essentially to perpetuate the differential in base wages between day and night inspectors.

The Secretary of Labor brought these cases to enjoin Corning from violating the Equal Pay Act [8] and to collect back wages allegedly due female employees because of past violations. Three distinct questions are presented:

Stat. Ann., Tit. 43, § 951 *et seq.* (Supp. 1974–1975), impliedly voided all laws and regulations specifically protecting one sex. See Op. Atty. Gen. No. 69–304, Dec. 5, 1969.

[8] The District Court in No. 73–29 issued a broadly worded injunction against all future violations of the Act. The Court of Appeals modified the injunction by limiting it to inspectors at the three plants at issue in that case, largely because of that court's belief that "Corning had been endeavoring since 1966—sincerely, if ineffectively—to bring itself into compliance." 474 F. 2d 226, 236 (CA2 1973). Since the Government did not seek certiorari from this aspect of the Second Circuit's judgment, we have no occasion to consider this question.

(1) Did Corning ever violate the Equal Pay Act by paying male night shift inspectors more than female day shift inspectors? (2) If so, did Corning cure its violation of the Act in 1966 by permitting women to work as night shift inspectors? (3) Finally, if the violation was not remedied in 1966, did Corning cure its violation in 1969 by equalizing day and night inspector wage rates but establishing higher "red circle" rates for existing employees working on the night shift?

II

Congress' purpose in enacting the Equal Pay Act was to remedy what was perceived to be a serious and endemic problem of employment discrimination in private industry—the fact that the wage structure of "many segments of American industry has been based on an ancient but outmoded belief that a man, because of his role in society, should be paid more than a woman even though his duties are the same." S. Rep. No. 176, 88th Cong., 1st Sess., 1 (1963). The solution adopted was quite simple in principle: to require that "equal work will be rewarded by equal wages." *Ibid.*

The Act's basic structure and operation are similarly straightforward. In order to make out a case under the Act, the Secretary must show that an employer pays different wages to employees of opposite sexes "for equal work on jobs the performance of which requires equal skill, effort, and responsibility, and which are performed under similar working conditions." Although the Act is silent on this point, its legislative history makes plain that the Secretary has the burden of proof on this issue,[9] as both of the courts below recognized.[10]

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[9] See 109 Cong. Rec. 9196 (1963) (Rep. Frelinghuysen); 109 Cong. Rec. 9208 (Rep. Goodell).

[10] *Hodgson* v. *Corning Glass Works*, 474 F. 2d 226, 231 (CA2 1973); *Brennan* v. *Corning Glass Works*, 480 F. 2d 1254, 1258 (CA3

The Act also establishes four exceptions—three specific and one a general catchall provision—where different payment to employees of opposite sexes "is made pursuant to (i) a seniority system; (ii) a merit system; (iii) a system which measures earnings by quantity or quality of production; or (iv) a differential based on any other factor other than sex." Again, while the Act is silent on this question, its structure and history also suggest that once the Secretary has carried his burden of showing that the employer pays workers of one sex more than workers of the opposite sex for equal work, the burden shifts to the employer to show that the differential is justified under one of the Act's four exceptions. All of the many lower courts that have considered this question have so held,[11] and this view is consistent with the general rule that the application of an exemption under the Fair Labor

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1973). See also *Hodgson* v. *Behrens Drug Co.*, 475 F. 2d 1041, 1049 (CA5 1973); *Hodgson* v. *Golden Isles Convalescent Homes, Inc.*, 468 F. 2d 1256, 1257 (CA5 1972); *Hodgson* v. *Fairmont Supply Co.*, 454 F. 2d 490, 493 (CA4 1972); *Hodgson* v. *Brookhaven General Hospital*, 436 F. 2d 719, 722 (CA5 1970); *Shultz* v. *American Can Co.-Dixie Products*, 424 F. 2d 356, 360 (CA8 1970).

[11] See *Hodgson* v. *Corning Glass Works*, *supra*, at 231; *Brennan* v. *Corning Glass Works*, *supra*, at 1258; *Hodgson* v. *Robert Hall Clothes, Inc.*, 473 F. 2d 589, 597 (CA3), cert. denied *sub nom. Brennan* v. *Robert Hall Clothes, Inc.*, 414 U. S. 866 (1973); *Hodgson* v. *Security Nat. Bank of Sioux City*, 460 F. 2d 57, 59 n. 4 (CA8 1972); *Shultz* v. *Wheaton Glass Co.*, 421 F. 2d 259, 266 (CA3), cert. denied, 398 U. S. 905 (1970); *Shultz* v. *American Can Co.*, *supra*, at 362; *Shultz* v. *First Victoria Nat. Bank*, 420 F. 2d 648, 654 n. 8 (CA5 1969); *Hodgson* v. *Industrial Bank of Savannah*, 347 F. Supp. 63, 67 (SD Ga. 1972); *Hodgson* v. *Maison Miramon, Inc.*, 344 F. Supp. 843, 845 (ED La. 1972); *Hodgson* v. *J. W. Lyles, Inc.*, 335 F. Supp. 128, 131 (Md. 1971), aff'd, 468 F. 2d 625 (CA4 1972); *Hodgson* v. *City Stores, Inc.*, 332 F. Supp. 942, 947 (MD Ala. 1971); *Shultz* v. *Kimberly-Clark Corp.*, 315 F. Supp. 1323, 1332 (WD Tenn. 1970); *Wirtz* v. *Basic Inc.*, 256 F. Supp. 786, 790 (Nev. 1966). See also 29 CFR § 800.141 (1973).

Standards Act is a matter of affirmative defense on which the employer has the burden of proof.[12]

The contentions of the parties in this case reflect the Act's underlying framework. Corning argues that the Secretary has failed to prove that Corning ever violated the Act because day shift work is not "performed under similar working conditions" as night shift work. The Secretary maintains that day shift and night shift work are performed under "similar working conditions" within the meaning of the Act.[13] Although the Secretary recognizes that higher wages may be paid for night shift work, the Secretary contends that such a shift differential would be based upon a "factor other than sex" within the catch-all exception to the Act and that Corning has failed to carry its burden of proof that its higher base wage for male night inspectors was in fact based on any factor other than sex.

The courts below relied in part on conflicting statements in the legislative history having some bearing on

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[12] See *A. H. Phillips, Inc.* v. *Walling*, 324 U. S. 490, 493 (1945); *Arnold* v. *Ben Kanowsky, Inc.*, 361 U. S. 388, 392 (1960); *Walling* v. *General Industries Co.*, 330 U. S. 545, 547–548 (1947); *Mitchell* v. *Kentucky Finance Co.*, 359 U. S. 290, 295 (1959).

[13] The Secretary also advances an argument that even if night and day inspection work is assumed not to be performed under similar working conditions, the differential in base wages is nevertheless unlawful under the Act. The additional burden of working at night, the argument goes, was already fully reflected in the plant-wide shift differential, and the shifts were made "similar" by payment of the shift differential. This argument does not appear to have been presented to either the Second or the Third Circuit, as the opinions in both cases reflect an assumption on the part of all concerned that the Secretary's case would fail unless night and day inspection work was found to be performed under similar working conditions. For this reason, and in view of our resolution of the "working condition" issue, we have no occasion to consider and intimate no views on this aspect of the Secretary's argument.

this question of statutory construction. The Third Circuit found particularly significant a statement of Congressman Goodell, a sponsor of the Equal Pay bill, who, in the course of explaining the bill on the floor of the House, commented that "standing as opposed to sitting, pleasantness or unpleasantness of surroundings, periodic rest periods, hours of work, *difference in shift,* all would logically fall within the working condition factor." 109 Cong. Rec. 9209 (1963) (emphasis added). The Second Circuit, in contrast, relied on a statement from the House Committee Report which, in describing the broad general exception for differentials "based on any other factor other than sex," stated: "Thus, among other things, shift differentials . . . would also be excluded. . . ." H. R. Rep. No. 309, 88th Cong., 1st Sess., 3 (1963).

We agree with Judge Friendly, however, that in this case a better understanding of the phrase "performed under similar working conditions" can be obtained from a consideration of the way in which Congress arrived at the statutory language than from trying to reconcile or establish preferences between the conflicting interpretations of the Act by individual legislators or the committee reports. As Mr. Justice Frankfurter remarked in an earlier case involving interpretation of the Fair Labor Standards Act, "regard for the specific history of the legislative process that culminated in the Act now before us affords more solid ground for giving it appropriate meaning." *United States* v. *Universal C. I. T. Credit Corp.*, 344 U. S. 218, 222 (1952).

The most notable feature of the history of the Equal Pay Act is that Congress recognized early in the legislative process that the concept of equal pay for equal work was more readily stated in principle than reduced to statutory language which would be meaningful to employers and workable across the broad range of industries covered

by the Act. As originally introduced, the Equal Pay bill required equal pay for "equal work on jobs the performance of which requires equal skills." There were only two exceptions—for differentials "made pursuant to a seniority or merit increase system which does not discriminate on the basis of sex. . . ." [14]

In both the House and Senate committee hearings, witnesses were highly critical of the Act's definition of equal work and of its exemptions. Many noted that most of American industry used formal, systematic job evaluation plans to establish equitable wage structures in their plants.[15] Such systems, as explained coincidentally by a representative of Corning Glass Works who testified at both hearings, took into consideration four separate factors in determining job value—skill, effort, responsibility and working conditions—and each of these four components was further systematically divided into various subcomponents.[16] Under a job evaluation plan, point values are assigned to each of the subcomponents of a given job, resulting in a total point figure representing a relatively objective measure of the job's value.

In comparison to the rather complex job evaluation plans used by industry, the definition of equal work used in the first drafts of the Equal Pay bill was criticized as

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[14] See S. 882, 88th Cong., 1st Sess., § 4 (1963); cf. S. 910, 88th Cong., 1st Sess., § 4 (a) (1963).

[15] See, *e. g.*, Hearings On Equal Pay Act of 1963 before the Subcommittee on Labor of the Senate Committee on Labor and Public Welfare, 88th Cong., 1st Sess., 26, 73, 79, 124, 140, 178 (1963) (hereinafter Senate Hearings); Hearings on Equal Pay Act before the Special Subcommittee on Labor of the House Committee on Education and Labor, 88th Cong., 1st Sess., 145–146 (1963) (hereinafter House Hearings).

[16] See Senate Hearings 96–104; House Hearings 232–240. See also House Hearings 304–305, 307–308.

unduly vague and incomplete. Industry representatives feared that as a result of the bill's definition of equal work, the Secretary of Labor would be cast in the position of second-guessing the validity of a company's job evaluation system. They repeatedly urged that the bill be amended to include an exception for job classification systems, or otherwise to incorporate the language of job evaluation into the bill.[17] Thus Corning's own representative testified:

> "Job evaluation is an accepted and tested method of attaining equity in wage relationship.
>
> "A great part of industry is committed to job evaluation by past practice and by contractual agreement as the basis for wage administration.
>
> " 'Skill' alone, as a criterion, fails to recognize other aspects of the job situation that affect job worth.
>
> "We sincerely hope that this committee in passing legislation to eliminate wage differences based on sex alone, will recognize in its language the general role of job evaluation in establishing equitable rate relationship." [18]

We think it plain that in amending the bill's definition of equal work to its present form, the Congress acted in direct response to these pleas. Spokesmen for the amended bill stated, for example, during the House debates:

> "The concept of equal pay for jobs demanding equal skill has been expanded to require also equal effort, responsibility, and similar working conditions. These factors are the core of all job classification

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[17] See, *e. g.*, Senate Hearings 73, 74, 79, 124, 130, 138, 140, 178; House Hearings 145, 146, 159, 199–200.

[18] Senate Hearings 98; House Hearings 234.

> systems. They form a legitimate basis for differentials in pay." [19]

Indeed, the most telling evidence of congressional intent is the fact that the Act's amended definition of equal work incorporated the specific language of the job evaluation plan described at the hearings by Corning's own representative—that is, the concepts of "skill," "effort," "responsibility," and "working conditions."

Congress' intent, as manifested in this history, was to use these terms to incorporate into the new federal Act the well-defined and well-accepted principles of job evaluation so as to ensure that wage differentials based upon bona fide job evaluation plans would be outside the purview of the Act. The House Report emphasized:

> "This language recognizes that there are many factors which may be used to measure the relationships between jobs and which establish a valid basis for a difference in pay. These factors will be found in a majority of the job classification systems. Thus, it is anticipated that a bona fide job classification program that does not discriminate on the basis of sex will serve as a valid defense to a charge of discrimination." H. R. Rep. No. 309, *supra,* at 3.

It is in this light that the phrase "working conditions" must be understood, for where Congress has used technical words or terms of art, "it [is] proper to explain them by reference to the art or science to which they [are] appropriate." *Greenleaf* v. *Goodrich,* 101 U. S. 278, 284 (1880). See also *NLRB* v. *Highland Park Mfg. Co.,* 341 U. S. 322, 326 (1951) (Frankfurter, J., dissenting). This principle is particularly salutary where, as

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[19] 109 Cong. Rec. 9195 (1963) (Rep. Frelinghuysen). See also H. R. Rep. No. 309, 88th Cong., 1st Sess., 8 (1963).

here, the legislative history reveals that Congress incorporated words having a special meaning within the field regulated by the statute so as to overcome objections by industry representatives that statutory definitions were vague and incomplete.

While a layman might well assume that time of day worked reflects one aspect of a job's "working conditions," the term has a different and much more specific meaning in the language of industrial relations. As Corning's own representative testified at the hearings, the element of working conditions encompasses two subfactors: "surroundings" and "hazards." [20] "Surroundings" measures the elements, such as toxic chemicals or fumes, regularly encountered by a worker, their intensity, and their frequency. "Hazards" takes into account the physical hazards regularly encountered, their frequency, and the severity of injury they can cause. This definition of "working conditions" is not only manifested in Corning's own job evaluation plans but is also well accepted across a wide range of American industry.[21]

Nowhere in any of these definitions is time of day worked mentioned as a relevant criterion. The fact of the matter is that the concept of "working conditions," as used in the specialized language of job evaluation systems, simply does not encompass shift differentials. Indeed, while Corning now argues that night inspection work is not equal to day inspection work, all of its own job evaluation plans, including the one now in effect, have consistently treated them as equal in all respects,

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[20] Senate Hearings 98–99; House Hearings 234–236.

[21] See D. Belcher, Wage and Salary Administration 271–274, 278, 287–289 (1955); 2 United States Dept. of Labor, Dictionary of Occupational Titles 656 (3d ed. 1965); United States Civil Service Commission, Job Grading System for Trades and Labor Occupations, F. P. M. Supp. 512–1, p. A3–3 (1970).

including working conditions.[22] And Corning's Manager of Job Evaluation testified in No. 73–29 that time of day worked was not considered to be a "working condition." [23] Significantly, it is not the Secretary in this case who is trying to look behind Corning's bona fide job evaluation system to require equal pay for jobs which Corning has historically viewed as unequal work. Rather, it is Corning which asks us to differentiate between jobs which the company itself has always equated. We agree with the Second Circuit that the inspection work at issue in this case, whether performed during the day or night, is "equal work" as that term is defined in the Act.[24]

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[22] Pursuant to its 1944 collective-bargaining agreement, Corning adopted a job classification system developed by its consultants, labeled the SJ&H plan, which evaluated inspector jobs on the basis of "general schooling," "training period," "manual skill," "versatility," "job knowledge," "responsibility," and "working conditions." Under this evaluation, the inspector jobs, regardless of shift, were found equal in all respects, including "working conditions," which were defined as the "surrounding conditions (wet, heat, cold, dust, grease, noises, etc.) and physical hazards (bruises, cuts, heavy lifting, fumes, slippery floors, machines, chemicals, gases, bodily injuries, etc.) to which employees are unavoidably subjected while performing the duties."

A new plan, put into effect in 1963–1964 and called the CGW plan, also found no significant differences in the duties performed by men and women inspectors and awarded the same point values for skill, effort, responsibility, and working conditions, regardless of shift.

[23] App. 66.

[24] In No. 73–29, Corning also claimed that the night inspection work was not equal to day shift inspection work because night shift inspectors had to do a certain amount of packing, lifting, and cleaning which was not performed by day shift inspectors. Noting that it is now well settled that jobs need not be identical in every respect before the Equal Pay Act is applicable, the Court of Appeals concluded that the extra work performed by night inspectors was of so little consequence that the jobs remained substantially equal. See 474 F. 2d, at 234. See also *Shultz* v. *Wheaton Glass Co.*,

This does not mean, of course, that there is no room in the Equal Pay Act for nondiscriminatory shift differentials. Work on a steady night shift no doubt has psychological and physiological impacts making it less attractive than work on a day shift. The Act contemplates that a male night worker may receive a higher wage than a female day worker, just as it contemplates that a male employee with 20 years' seniority can receive a higher wage than a woman with two years' seniority. Factors such as these play a role under the Act's four exceptions—the seniority differential under the specific seniority exception, the shift differential under the catch-all exception for differentials "based on any other factor other than sex." [25]

The question remains, however, whether Corning carried its burden of proving that the higher rate paid for night inspection work, until 1966 performed solely by men, was in fact intended to serve as compensation for night work, or rather constituted an added payment based upon sex. We agree that the record amply supports the District Court's conclusion that Corning had not sustained its burden of proof.[26] As its history revealed,

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421 F. 2d, at 265; *Shultz* v. *American Can Co.*, 424 F. 2d, at 360; *Hodgson* v. *Fairmont Supply Co.*, 454 F. 2d, at 493. The company has not pursued this issue here.

[25] An administrative interpretation by the Wage and Hour Administrator recognizes the legitimacy of night shift differentials shown to be based on a factor other than sex. See 29 CFR § 800.145 (1973).

[26] This question, as well as the questions discussed in Part III, *infra*, were considered by the District Court and the Court of Appeals only in No. 73–29, and not in No. 73–695, since in the latter case the courts below concluded that the Secretary had failed to prove that night and day shift inspection work was performed under similar working conditions. We deal with these issues, then, only on the basis of the record in No. 73–29. To the extent that there are any differences in the records in these two cases on factual

"the higher night rate was in large part the product of the generally higher wage level of male workers and the need to compensate them for performing what were regarded as demeaning tasks." 474 F. 2d, at 233. The differential in base wages originated at a time when no other night employees received higher pay than corresponding day workers, and it was maintained long after the company instituted a separate plant-wide shift differential which was thought to compensate adequately for the additional burdens of night work. The differential arose simply because men would not work at the low rates paid women inspectors, and it reflected a job market in which Corning could pay women less than men for the same work. That the company took advantage of such a situation may be understandable as a matter of economics, but its differential nevertheless became illegal once Congress enacted into law the principle of equal pay for equal work.

III

We now must consider whether Corning continued to remain in violation of the Act after 1966 when, without changing the base wage rates for day and night inspectors, it began to permit women to bid for jobs on the night shift as vacancies occurred. It is evident that this was more than a token gesture to end discrimination, as turnover in the night shift inspection jobs was rapid. The record in No. 73–29 shows, for example, that during the two-year period after June 1, 1966, the date women were first permitted to bid for night inspection jobs, women took 152 of the 278 openings, and women with very little seniority were able to obtain positions on the night shift.

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matters relating to these questions, we leave it to the District Court and the Court of Appeals in No. 73–695 to resolve these questions, in the first instance, on the basis of the record created in that case.

Relying on these facts, the company argues that it ceased discriminating against women in 1966, and was no longer in violation of the Equal Pay Act.

But the issue before us is not whether the company, in some abstract sense, can be said to have treated men the same as women after 1966. Rather, the question is whether the company remedied the specific violation of the Act which the Secretary proved. We agree with the Second Circuit, as well as with all other circuits that have had occasion to consider this issue, that the company could not cure its violation except by equalizing the base wages of female day inspectors with the higher rates paid the night inspectors. This result is implicit in the Act's language, its statement of purpose, and its legislative history.

As the Second Circuit noted, Congress enacted the Equal Pay Act "[r]ecognizing the weaker bargaining position of many women and believing that discrimination in wage rates represented unfair employer exploitation of this source of cheap labor." 474 F. 2d, at 234. In response to evidence of the many families dependent on the income of working women, Congress included in the Act's statement of purpose a finding that "the existence . . . of wage differentials based on sex . . . depresses wages and living standards for employees necessary for their health and efficiency." Pub. L. 88–38, § 2 (a) (1), 77 Stat. 56 (1963). And Congress declared it to be the policy of the Act to correct this condition. § 2 (b).

To achieve this end, Congress required that employers pay equal pay for equal work and then specified:

> "*Provided*, That an employer who is paying a wage rate differential in violation of this subsection shall not, in order to comply with the provisions of this subsection, reduce the wage rate of any employee." 29 U. S. C. § 206 (d)(1).

The purpose of this proviso was to ensure that to remedy violations of the Act, "[t]he lower wage rate must be increased to the level of the higher." H. R. Rep. No. 309, *supra*, at 3. Comments of individual legislators are all consistent with this view. Representative Dwyer remarked, for example, "The objective of equal pay legislation . . . is not to drag down men workers to the wage levels of women, but to raise women to the levels enjoyed by men in cases where discrimination is still practiced." [27] Representative Griffin also thought it clear that "[t]he only way a violation could be remedied under the bill . . . is for the lower wages to be raised to the higher." [28]

By proving that after the effective date of the Equal Pay Act, Corning paid female day inspectors less than male night inspectors for equal work, the Secretary implicitly demonstrated that the wages of female day shift inspectors were unlawfully depressed and that the fair wage for inspection work was the base wage paid to male inspectors on the night shift. The whole purpose of the Act was to require that these depressed wages be raised, in part as a matter of simple justice to the employees themselves, but also as a matter of market economics, since Congress recognized as well that discrimination in wages on the basis of sex "constitutes an unfair method of competition." Pub. L. 88–38, *supra*, § 2 (a)(5).

We agree with Judge Friendly that

> "In light of this apparent congressional understanding, we cannot hold that Corning, by allowing some—or even many—women to move into the higher paid night jobs, achieved full compliance with the Act. Corning's action still left the inspectors on the day shift—virtually all women—earning a lower

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[27] 109 Cong. Rec. 2714 (1963).

[28] House Hearings, *supra*, n. 15, at 65. See also 109 Cong. Rec. 9196 (Rep. Thompson).

base wage than the night shift inspectors because of a differential initially based on sex and still not justified by any other consideration; in effect, Corning was still taking advantage of the availability of female labor to fill its day shift at a differentially low wage rate not justified by any factor other than sex." 474 F. 2d, at 235.

The Equal Pay Act is broadly remedial, and it should be construed and applied so as to fulfill the underlying purposes which Congress sought to achieve. If, as the Secretary proved, the work performed by women on the day shift was equal to that performed by men on the night shift, the company became obligated to pay the women the same base wage as their male counterparts on the effective date of the Act. To permit the company to escape that obligation by agreeing to allow some women to work on the night shift at a higher rate of pay as vacancies occurred would frustrate, not serve, Congress' ends. See *Shultz* v. *American Can Co.-Dixie Products*, 424 F. 2d 356, 359 (CA8 1970); *Hodgson* v. *Miller Brewing Co.*, 457 F. 2d 221, 227 (CA7 1972); *Hodgson* v. *Square D Co.*, 459 F. 2d 805, 808–809 (CA6 1972).

The company's final contention—that it cured its violation of the Act when a new collective-bargaining agreement went into effect on January 20, 1969—need not detain us long. While the new agreement provided for equal base wages for night or day inspectors hired after that date, it continued to provide unequal base wages for employees hired before that date, a discrimination likely to continue for some time into the future because of a large number of laid-off employees who had to be offered re-employment before new inspectors could be hired. After considering the rather complex method in which the new wage rates for employees hired prior to January 1969 were calculated and the company's stated purpose

behind the provisions of the new agreement, the District Court in No. 73–29 concluded that the lower base wage for day inspectors was a direct product of the company's failure to equalize the base wages for male and female inspectors as of the effective date of the Act. We agree it is clear from the record that had the company equalized the base-wage rates of male and female inspectors on the effective date of the Act, as the law required, the day inspectors in 1969 would have been entitled to the same higher "red circle" rate the company provided for night inspectors.[29] We therefore conclude that on the facts of this case, the company's continued discrimination in base wages between night and day workers, though phrased in terms of a neutral factor other than sex, nevertheless operated to perpetuate the effects of the company's prior illegal practice of paying women less

[29] The January 1969 agreement provided an 8% or 20¢ per hour across-the-board wage increase, applied to the pre-January 1969 base wage and made retroactive to November 4, 1968. The contract also instituted new "job evaluation" wage rates for various positions. In the case of inspectors, the new "job evaluation" rate was higher than the retroactively increased base wage of day shift inspectors but was lower than the retroactively increased base wage of night shift inspectors. The contract further provided that where the job evaluation rate was less than the current rate for the job—that is, less than the retroactively increased old rate—employees hired before January 20, 1969, would continue to be paid the old rate, through "red circle" protection. Thus, the day shift inspectors received the new job evaluation rate, while the night shift inspectors continued to receive the higher "red circle" night shift base wage. Had the company complied with the law and equalized the base wages of day shift inspectors prior to 1969, the retroactively increased base wage of day shift inspectors would have been the same as the retroactively increased rate of night shift inspectors, and the day shift inspectors would have been entitled to the same "red circle" protection granted the night shift inspectors, since that retroactively increased rate was higher than the new job evaluation rate.

than men for equal work. Cf. *Griggs* v. *Duke Power Co.*, 401 U. S. 424, 430 (1971).

The judgment in No. 73–29 is affirmed. The judgment in No. 73–695 is reversed and the case remanded to the Court of Appeals for further proceedings consistent with this opinion.

It is so ordered.

MR. JUSTICE STEWART took no part in the consideration or decision of these cases.

THE CHIEF JUSTICE, MR. JUSTICE BLACKMUN, and MR. JUSTICE REHNQUIST dissent and would affirm the judgment of the Court of Appeals for the Third Circuit and reverse the judgment of the Court of Appeals for the Second Circuit for the reasons stated by Judge Adams in his opinion for the Court of Appeals in *Brennan* v. *Corning Glass Works*, 480 F. 2d 1254 (CA3 1973).

Syllabus

ANDERSON ET AL. *v.* UNITED STATES

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

No. 73-346. Argued March 19, 1974—Decided June 3, 1974

For having conspired to cast fictitious votes for federal, state, and local candidates in a West Virginia primary election, petitioners were convicted of violating 18 U. S. C. § 241, which makes it unlawful to conspire to injure any citizen in the free exercise or enjoyment of any right or privilege secured by the Constitution or laws of the United States. At the trial, over petitioners' objections, certain statements made by two of the petitioners at a local election contest hearing held after the election results had been certified on May 27, 1970, were admitted in evidence against all the petitioners to prove that the two petitioners making the statements had perjured themselves at the election contest hearing. On appeal, the petitioners contended for the first time that § 241 was limited to conspiracies to cast false votes in federal elections, and that accordingly the conspiracy charged in their case, as far as federal jurisdiction was concerned, ended on May 27, so that subsequent out-of-court statements could not have furthered any § 241 conspiracy and hence should not have been admitted in evidence. The Court of Appeals rejected these contentions, and affirmed the convictions. *Held:*

1. The out-of-court statements were admissible under basic principles of the law of evidence and conspiracy, regardless of whether or not § 241 encompasses conspiracies to cast fraudulent votes in state and local elections. Pp. 214–222.

(a) The statements were not hearsay, since they were not offered in evidence to prove the truth of the matter asserted; hence their admissibility was governed by the rule that acts of one alleged conspirator can be admitted into evidence against the other conspirators, if relevant to prove the existence of the conspiracy, even though they may have occurred after the conspiracy ended. *Lutwak* v. *United States*, 344 U. S. 604. Pp. 219–221.

(b) Since the statements were not hearsay, the jury did not have to make a preliminary finding that the conspiracy charged

was still in progress before it could consider them as evidence against the other defendants, and accordingly the statements were admissible if relevant to prove the conspiracy charged. P. 221.

(c) Even if the federal conspiracy ended on May 27, the fact that two of the petitioners perjured themselves at the local election contest hearing was relevant and admissible to prove the underlying motive of the conspiracy. Accordingly, in order to rule on petitioners' challenge to the admissibility of this evidence, there was no need for the Court of Appeals, and there is no need for this Court, to decide whether petitioners' conspiracy ended on May 27 for purposes of federal jurisdiction or whether § 241 applies to conspiracies to cast fraudulent votes in local elections. Pp. 221–222.

2. The evidence amply supports the verdict that each of the petitioners engaged in the conspiracy with the intent of having false votes cast for the federal candidates. Pp. 222–228.

(a) The fact that petitioners' primary motive was to affect the result in the local rather than the federal election has no significance, since although a single conspiracy may have several purposes, if one of them—whether primary or secondary—violates a federal law, the conspiracy is unlawful under federal law. Pp. 225–226.

(b) That the petitioners may have had no purpose to change the outcome of the federal election is irrelevant, since that is not the specific intent required under § 241, but rather the intent to have false votes cast and thereby to injure the right of all voters in a federal election to have their expressions of choice given full value, without dilution or distortion by fraudulent balloting. Pp. 226–227.

(c) Even assuming, *arguendo*, that § 241 is limited to conspiracies to cast false votes for federal candidates, it was not plain error for the District Court's jury instructions not to focus specifically upon the federal conspiracy, since in view of the fact that the prosecution's case showed a single conspiracy to cast entire slates of false votes and the defense consisted primarily of a challenge to the Government witnesses' credibility, it is inconceivable that, even if charged by more specific instructions, the jury could have found a conspiracy to cast false votes for local offices without also finding a similar conspiracy affecting the federal offices. Pp. 227–228.

481 F. 2d 685, affirmed.

MARSHALL, J., delivered the opinion of the Court, in which BURGER, C. J., and WHITE, STEWART, BLACKMUN, POWELL, and REHNQUIST, JJ., joined. DOUGLAS, J., filed a dissenting opinion, in which BRENNAN, J., joined, *post*, p. 228.

David Ginsburg argued the cause for petitioners. With him on the brief was *Albert J. Beveridge III.*

Deputy Solicitor General Wallace argued the cause for the United States. With him on the brief were *Solicitor General Bork, Assistant Attorney General Pottinger, Gerald P. Norton, Walter W. Barnett,* and *Jeffrey R. Whieldon.*

MR JUSTICE MARSHALL delivered the opinion of the Court.

Petitioners were convicted of violating 18 U. S. C. § 241, which, in pertinent part, makes it unlawful for two or more persons to "conspire to injure, oppress, threaten, or intimidate any citizen in the free exercise or enjoyment of any right or privilege secured to him by the Constitution or laws of the United States . . . ." Specifically, the Government proved that petitioners engaged in a conspiracy to cast fictitious votes for candidates for federal, state, and local offices in a primary election in Logan County, West Virginia. At the trial, a question arose concerning the admissibility against all of the petitioners of certain out-of-court statements made by some of them. In considering the propriety of the District Court's decision to admit this evidence, the Court of Appeals thought it necessary to resolve the question whether a conspiracy to cast false votes in a state or local election, as opposed to a conspiracy to cast false votes in a federal election, is unlawful under § 241. The Court of Appeals affirmed petitioners' convictions, concluding that § 241 encompasses "conspiracies, involving state action at least, to dilute the effect of ballots

cast for the candidate of one's choice in wholly state elections." 481 F. 2d 685, 700–701 (CA4 1973). We granted certiorari to consider this question. 414 U. S. 1091 (1973). It now appears, however, that the out-of-court statements at issue were admissible under basic principles of the law of evidence and conspiracy, regardless of whether or not § 241 encompasses conspiracies to cast fraudulent votes in state and local elections. Accordingly we affirm the judgment of the Court of Appeals without passing on its interpretation of § 241.

I

The underlying facts are not in dispute. On May 12, 1970, a primary election was held in West Virginia for the purpose of nominating candidates for the United States Senate, United States House of Representatives, and various state and local offices. One of the nominations most actively contested in Logan County was the Democratic nomination for County Commissioner, an office vested with a wide variety of legislative, executive, and judicial powers.[1] Among the several candidates for the Democratic nomination for this office were the incumbent, Okey Hager, and his major opponent, Neal Scaggs.

Petitioners are state or county officials, including the Clerk of the Logan County Court, the Clerk of the County Circuit Court, the Sheriff and Deputy Sheriff of the County, and a State Senator. The evidence at trial showed that by using the power of their office, the petitioners convinced three election officials in charge of the Mount Gay precinct in Logan County to cast false and fictitious votes on the voting machines and then to

[1] The County Commissioner sits on the County Court which is the central governmental body in the county. See *State ex rel. Dingess* v. *Scaggs*, — W. Va. —, —, 195 S. E. 2d 724, 726 (1973). See also W. Va. Code Ann., § 7–1–3 *et seq.* (1969).

destroy poll slips so that the number of persons who had actually voted could not be determined except from the machine tally.[2] While it is apparent from the record that the primary purpose behind the casting of false votes was to secure the nomination of Hager for the office of County Commissioner, it is equally clear that about 100 false votes were in fact cast not only for Hager, but also for Senator Robert Byrd and Representative Ken Hechler, who appeared on the ballot for renomination to their respective chambers of the United States Congress, as well as for other state and local candidates considered part of the Hager slate.[3]

The conspiracy achieved its primary objective, the countywide vote totals showing Hager the winner by 21 votes, counting the Mount Gay precinct returns. About two weeks after the election, on May 27, 1970, the election results were certified. After that date, Scaggs filed an election contest[4] challenging certain returns, includ-

[2] The participation of the election officials was secured by threats of indictment or arrest, or promises of county jobs and money.

[3] Of the 541 persons listed as eligible to vote at the Mount Gay precinct, the Government proved that 222 did not vote and that 13 more were either dead, in the hospital, or in prison. This left a maximum of 306 who could have voted. Observers at the precinct throughout election day estimated that about 275 persons had actually voted. Nevertheless 348 votes were recorded as cast for candidates for the nominees for United States Senator, 328 for Congressman, 358 for State Senator, 458 for House of Delegates, 375 for County Commissioner (long term), 365 for County Commissioner (short term), 371 for Justice of the Peace, and 371 for Constable.

[4] The election contest, at which candidate Hager was one of the two presiding judges, was concluded on August 25, 1970. Although the court was required by statute to rule on the contest by September 17, 1970, see W. Va. Code Ann., § 3–7–7, it failed to enter a final order within the statutory period. Scaggs appealed to an intermediate appellate court, which granted an appeal. The Supreme Court of Appeals of West Virginia, however, ruled that the intermediate appellate court lacked jurisdiction since no decision had been

ing the Mount Gay County Commissioner votes. No challenge was made, however, to the Mount Gay votes for either of the federal offices, and they became final on May 27.

A hearing was held in the County Court on the election contest at which petitioners Earl Tomblin and John R. Browning gave sworn testimony. The prosecution in the § 241 trial sought to prove that Tomblin and Browning perjured themselves at the election contest hearing in a continuing effort to have the fraudulent votes for Hager counted and certified. For example, one of the key issues in the election contest was whether sufficient voters had in fact turned out in Mount Gay precinct to justify the unusually high reported returns. Tomblin testified under oath at the election contest that he had visited Mount Gay precinct on election day and had observed one Garrett Sullins there as Sullins went in to vote. The prosecution at the § 241 trial, however, offered testimony from Sullins himself that he was in the hospital and never went to the Mount Gay precinct on election day.

At trial, the other defendants objected to the introduction of Tomblin's prior testimony on the ground that it was inadmissible against anyone but Tomblin. The District Court overruled the objection but instructed the jury that Tomblin's testimony could be considered only as bearing upon his guilt or innocence, unless the jury should determine that at the time Tomblin gave this testimony, a conspiracy existed between him and the other defendants and that the testimony was made in furtherance of the conspiracy, in which case the jury could consider the testimony as bearing upon the guilt

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rendered by the County Court within the statutory time allowed. See *State ex rel. Hager* v. *Oakley*, 154 W. Va. 528, 177 S. E. 2d 585 (1970).

or innocence of the other defendants. A similar objection was made to the introduction of Browning's election contest testimony and a similar cautionary instruction given when that objection was overruled.

In oral argument before the Court of Appeals, petitioners for the first time [5] sought to link their objection to the introduction of this evidence to a particular interpretation of § 241. See 481 F. 2d, at 694. Specifically, petitioners argued that § 241 was limited to conspiracies to cast false votes in federal elections and did not apply to local elections. Accordingly, they contended that the conspiracy in the present case, so far as federal jurisdiction was concerned, ended on May 27, 1970, the date on which the election returns were certified and the federal returns became final. Statements made after this date by one alleged conspirator, the argument continued, could not, as a matter of law, have been made in furtherance of

[5] Other gounds for exclusion argued before the District Court and in the briefs before the Court of Appeals have not been pursued here. These include a contention that introduction of the prior testimony had the effect of putting Tomblin and Browning on the witness stand in violation of their constitutional right to stand mute, a suggestion that since the testimony was given in a judicial hearing there might be *Miranda* problems, and the argument that the prior testimony of Tomblin and Browning was inadmissible impeachment evidence since both had exercised their constitutional right not to testify. See 481 F. 2d 685, 694.

The Court of Appeals recognized that it need not ordinarily consider grounds of objection not presented to the trial court. See *Hormel* v. *Helvering*, 312 U. S. 552, 556 (1941). This rule is not without its exceptions, however, particularly in criminal cases where appellate courts can notice errors seriously affecting the fairness or integrity of judicial proceedings. See *United States* v. *Atkinson*, 297 U. S. 157, 160 (1936). See also *Hormel* v. *Helvering*, *supra*, at 557. In view of the fact that petitioners did challenge the admissibility of the Tomblin and Browning testimony at trial, we think it was proper for the Court of Appeals to consider all grounds related to that underlying objection.

the conspiracy charged under § 241 and therefore should not have been considered by the jury in determining the guilt or innocence of the other defendants.

The Government countered before the Court of Appeals that, whether the federal conspiracy had ended or not, the election contest testimony of Tomblin and Browning was admissible under the principles enunciated in *Lutwak* v. *United States*, 344 U. S. 604 (1953). The Court of Appeals, however, decided not to tarry over this point and instead, in its own words, chose "to meet directly the contention that federal jurisdiction over the alleged conspiracy ended with the certification in the federal election contests . . . ." See 481 F. 2d, at 698. We think it inadvisable, however, to reach out in this fashion to pass on important questions of statutory construction when simpler, and more settled, grounds are available for deciding the case at hand. In our view, the basic principles of evidence and conspiracy law set down in *Lutwak* are dispositive of petitioners' evidentiary claims.

The doctrine that declarations of one conspirator may be used against another conspirator, if the declaration was made during the course of and in furtherance of the conspiracy charged, is a well-recognized exception to the hearsay rule which would otherwise bar the introduction of such out-of-court declarations. See *Lutwak* v. *United States*, *supra*, at 617. See also *Krulewitch* v. *United States*, 336 U. S. 440 (1949). The hearsay-conspiracy exception applies only to declarations made while the conspiracy charged was still in progress, a limitation that this Court has "scrupulously observed." [6]

[6] The rationale for both the hearsay-conspiracy exception and its limitations is the notion that conspirators are partners in crime. *United States* v. *Socony-Vacuum Oil Co.*, 310 U. S. 150, 253 (1940); *Fiswick* v. *United States*, 329 U. S. 211, 216 (1946). As such, the law deems them agents of one another. And just as the declarations of

See *Krulewitch* v. *United States, supra,* at 443–444. See also *Lutwak* v. *United States, supra,* at 617–618; *Fiswick* v. *United States,* 329 U. S. 211, 217 (1946); *Wong Sun* v. *United States,* 371 U. S. 471, 490 (1963).

But, as the Court emphasized in *Lutwak,* the requirement that out-of-court declarations by a conspirator be shown to have been made while the conspiracy charged was still in progress and in furtherance thereof arises only because the declaration would otherwise be hearsay. The ongoing conspiracy requirement is therefore inapplicable to evidence, such as that of *acts* of alleged conspirators, which would not otherwise be hearsay. Thus the Court concluded in *Lutwak* that acts of one alleged conspirator could be admitted into evidence against the other conspirators, if relevant to prove the existence of the conspiracy, "even though they might have occurred after the conspiracy ended." 344 U. S., at 618. See also *United States* v. *Chase,* 372 F. 2d 453 (CA4 1967); Note, Developments in the Law—Criminal Conspiracy, 72 Harv. L. Rev. 920, 988 (1959).

The obvious question that arises in the present case, then, is whether the out-of-court statements of Tomblin and Browning were hearsay. We think it plain they were not. Out-of-court statements constitute hearsay only when offered in evidence to prove the truth of the matter asserted.[7] The election contest testimony of Tomblin and Browning, however, was not admitted into evidence

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an agent bind the principal only when the agent acts within the scope of his authority, so the declaration of a conspirator must be made in furtherance of the conspiracy charged in order to be admissible against his partner. See *Krulewitch* v. *United States,* 336 U. S. 440, 442–443 (1949); *Fiswick* v. *United States, supra,* at 217; *Wong Sun* v. *United States,* 371 U. S. 471, 490 (1963). See generally 4 J. Wigmore, Evidence §§ 1077–1079 (Chadbourne rev. 1972).

[7] See 5 J. Wigmore, Evidence § 1361 (3d ed. 1940); C. McCormick, Law of Evidence 460 (1954).

in the § 241 trial to prove the truth of anything asserted therein. Quite the contrary, the point of the prosecutor's introducing those statements was simply to prove that the statements were made [8] so as to establish a foundation for later showing, through other admissible evidence, that they were false.[9] The rationale of the hearsay rule is inapplicable as well. The primary justification for the exclusion of hearsay is the lack of any opportunity for the adversary to cross-examine the absent declarant whose out-of-court statement is introduced into evidence.[10] Here, since the prosecution was not contending that anything Tomblin or Browning said at the election contest was true, the other defendants had no interest in cross-examining them so as to put their credibility in issue.[11] Cf. *Pointer* v. *Texas*, 380

[8] Of course, evidence is not hearsay when it is used only to prove that a prior statement was made and not to prove the truth of the statement. See *Dutton* v. *Evans*, 400 U. S. 74, 88 (1970) (opinion of STEWART, J.). See also *Creaghe* v. *Iowa Home Mut. Cas. Co.*, 323 F. 2d 981 (CA10 1963); *General Tire of Miami Beach, Inc.* v. *NLRB*, 332 F. 2d 58 (CA5 1964); *Safeway Stores, Inc.* v. *Combs*, 273 F. 2d 295 (CA5 1960); *Ford Motor Co.* v. *Webster's Auto Sales, Inc.*, 361 F. 2d 874 (CA1 1966).

[9] Thus, in his opening argument the prosecutor said: "I believe the evidence will show, frankly, that that election contest was full of perjurious testimony, full of lies. Some of it, the evidence will show, was solicited and caused by these defendants." App. 22. The same point was made in closing argument. Tr. 1851–1852.

[10] See 5 J. Wigmore, *supra*, n. 7, at § 1362. See also *Colorificio Italiano Max Meyer, S. P. A.* v. *S/S Hellenic Wave*, 419 F. 2d 223 (CA5 1969); *Rossville Salvage Corp.* v. *S. E. Graham Co.*, 319 F. 2d 391 (CA3 1963); *Superior Engraving Co.* v. *NLRB*, 183 F. 2d 783 (CA7 1950), cert. denied, 340 U. S. 930 (1951).

[11] Technically, of course, the proffered evidence was hearsay in that the Government sought to prove the prior testimony of Tomblin and Browning by reading a transcript of the election contest hearing into evidence at the § 241 trial, rather than by calling as a witness a person who himself heard the Tomblin and Browning testimony. A

U. S. 400 (1965); *Barber* v. *Page,* 390 U. S. 719 (1968); *Bruton* v. *United States,* 391 U. S. 123 (1968).

Since these prior statements were not hearsay, the jury did not have to make a preliminary finding that the conspiracy charged under § 241 was still in progress before it could consider them as evidence against the other defendants. The prior testimony was accordingly admissible simply if relevant in some way to prove the conspiracy charged. See *Lutwak* v. *United States,* 344 U. S., at 617.

As we read the record, there can be no doubt that the evidence of perjury by petitioners Tomblin and Browning in the election contest was relevant to make out the Government's case under § 241, even assuming, *arguendo,* that the petitioners' conspiracy ended, for purposes of federal jurisdiction, on May 27, 1970, with the certification of the federal election returns. For even if federal jurisdiction rested only on that aspect of the conspiracy involving the federal candidates, the proof at trial need not have been so limited. The prosecution was entitled to prove the underlying purpose and motive of the conspirators in order to convince the jury, beyond a reasonable doubt, that petitioners had in fact unlawfully conspired to cast false votes in the election. See *Lutwak* v. *United States, supra,* at 617. As it was never suggested that either Senator Byrd or Representative Hechler needed or sought the assistance of an unlawful conspiracy in order

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well-recognized exception to the hearsay rule, however, permits the introduction of certified court transcripts to prove the testimony given at a prior proceeding. See generally 5 J. Wigmore, *supra,* n. 7, at § 1681. Nor is there any right-of-confrontation problem here, since petitioners did not suggest below that the transcript read at the § 241 trial did not accurately reflect the testimony actually given at the election contest hearing.

to win his respective nomination, a key issue in this prosecution, accepting for the sake of argument petitioners' view of § 241, was whether and why petitioners conspired to have false votes cast for these federal candidates. The fact that two of the petitioners perjured themselves at an election contest in which the Mount Logan votes for Hager were at stake helped prove the underlying motive of the conspiracy, by demonstrating that the false votes for federal officers were not an end in themselves, but rather part of a conspiracy to obtain Hager's nomination through unlawful means. The jury could have inferred that the petitioners were motivated in casting false federal ballots by the need to conceal the fraudulent votes for Hager, since the casting of large numbers of false ballots for County Commissioner would likely have aroused suspicion in the absence of the casting of a similar number of false votes for the other offices at issue in the election.

Even if the federal conspiracy ended on May 27, then, the Tomblin and Browning election contest testimony was relevant to prove the offense charged. Accordingly, in order to rule on petitioners' challenge to the admissibility of this evidence, there was no need for the Court of Appeals, and there is no need for us, to decide whether petitioners' conspiracy ended on May 27 for purposes of federal jurisdiction or whether § 241 applies to conspiracies to cast fraudulent votes in local elections.

II

Petitioners argue, however, that the evidence at trial was insufficient to show that they had engaged in a conspiracy to cast false votes for the federal officers and that their convictions under § 241 can stand only if we hold that section applicable to a conspiracy to cast false votes

in a local election.[12] Our examination of the record leads us to conclude otherwise.

Two principles form the backdrop for our analysis of the record. It is established that since the gravamen of the offense under § 241 is conspiracy, the prosecution must show that the offender acted with a specific intent to interfere with the federal rights in question. See *United States* v. *Guest*, 383 U. S. 745, 753–754 (1966); *Screws* v. *United States*, 325 U. S. 91 (1945). Moreover,

[12] In briefing this case, all parties appear to have assumed that this sufficiency-of-the-evidence claim was properly before this Court. It seems clear, however, that this issue was presented neither to the Court of Appeals nor to us in the petition for a writ of certiorari. As indicated earlier, the § 241 question arose below only with respect to the admissibility of the prior testimony of Browning and Tomblin, and not in connection with any claim that the evidence was insufficient to support a verdict under the statute. We nevertheless consider the sufficiency-of-the-evidence claim here. We recognize that petitioners did raise before both the District Court and the Court of Appeals, and in the petition for a writ of certiorari a claim that the indictment was unconstitutionally vague, and the gist of their argument on this point was that the Government had charged a conspiracy to cast false votes for both federal and local candidates in order to survive a motion to dismiss the indictment, but had turned around at trial and proved only a conspiracy to cast false votes for the local candidates. This argument therefore raised the substance of petitioners' present contention that the evidence was insufficient to show a conspiracy to cast false votes for federal candidates. Moreover, as we have had occasion to note, a claim that a conviction is based on a record lacking any evidence relevant to crucial elements of the offense is a claim with serious constitutional overtones. See, *e. g.*, *Thompson* v. *Louisville*, 362 U. S. 199 (1960); *Johnson* v. *Florida*, 391 U. S. 596 (1968). See also *Adderley* v. *Florida*, 385 U. S. 39, 44 (1966). Accordingly, even though the sufficiency-of-the-evidence issue was not raised below with any particularity, we think the interests of justice require its consideration here. See *Screws* v. *United States*, 325 U. S. 91, 107 (1945) (opinion of DOUGLAS, J.). Cf. *Lawn* v. *United States*, 355 U. S. 339, 362 n. 16 (1958).

we scrutinize the record for evidence of such intent with special care in a conspiracy case for, as we have indicated in a related context, "charges of conspiracy are not to be made out by piling inference upon inference, thus fashioning . . . a dragnet to draw in all substantive crimes." *Direct Sales Co.* v. *United States*, 319 U. S. 703, 711 (1943). See also *Ingram* v. *United States*, 360 U. S. 672, 680 (1959).

Even with these caveats in mind, we find the record amply bears out the verdict that each of the petitioners engaged in the conspiracy with the intent of having false votes cast for the federal officers. The Government's chief witness was Cecil Elswick, an unindicted coconspirator who served as the Republican election officer at the Mount Gay precinct and who actually cast most of the fraudulent votes. Elswick testified that he was first approached by petitioner Red Hager, the son of Okey Hager, who told Elswick to go along with them to win the Mount Gay precinct or else he, Red Hager, would cause Elswick trouble. When asked on direct examination for whom he was told to win the precinct, Elswick testified: "For the Okey Hager slate and Senator Byrd and Ken Hechler." App. 40. When Elswick expressed an interest in going along, Red Hager arranged for a meeting between Elswick and Tomblin at which Tomblin confirmed an offer of a part-time deputy sheriff job for Elswick as a reward for his help in the election fraud. Elswick later met with petitioner W. Bernard Smith in Tomblin's office, and Smith then instructed him on how to proceed to win the election. The night before the election, Elswick met with all five of the petitioners. At this meeting cash payments for the false votes were discussed and petitioners Smith and Hager emphasized the need for putting "all the votes" on the machine. Later that evening, Elswick accompanied Tomblin to visit Garrett

Sullins, a candidate for justice of the peace listed on the Hager slate. Tomblin told Sullins not to worry about his election because they had him "slated," so long as Sullins' wife, another Mount Gay precinct election official, would go along with the illegal voting.

Elswick then testified as to how he actually put the fraudulent votes on the machines. When a voter came into the precinct and asked for help in using the machines to vote the Neal Scaggs slate, Elswick and Mrs. Sullins would join the voter in the voting machine and, aligning their bodies so as to conceal what they were doing, would put votes on the machine for the entire Hager slate. In addition, Elswick simply went into the voting machine on his own and cast many fictitious ballots. Through a comparison between the reported returns and the number of persons who actually voted, false votes were shown to have been cast for every office—federal, state, and local. See n. 3, *supra*.

We think this evidence amply supported the jury's conclusion that each of the petitioners knowingly participated in a conspiracy which contemplated the casting of false votes for all offices at issue in the election. The evidence at trial tended to show a single conspiracy, the primary objective of which was to have false votes cast for Hager but which also encompassed the casting of false votes for candidates for all other offices, including Senator Byrd and Representative Hechler. True, there was little discussion among the conspirators of the federal votes *per se*, just as there was little discussion of the Hager votes in and of themselves, but the jury could believe this was only a reflection of the conspirators' underlying assumption that false votes would have to be cast for entire slates of candidates in order to have their fraud go undetected.

In our view, petitioners err in seeking to attach significance to the fact that the primary motive behind their

conspiracy was to affect the result in the local rather than the federal election. A single conspiracy may have several purposes, but if one of them—whether primary or secondary—be the violation of a federal law, the conspiracy is unlawful under federal law. See *Ingram* v. *United States*, 360 U. S., at 679–680. It has long been settled that § 241 embraces a conspiracy to stuff the ballot box at an election for federal officers, and thereby to dilute the value of votes of qualified voters; see *United States* v. *Saylor*, 322 U. S. 385 (1944). See also *United States* v. *Mosley*, 238 U. S. 383 (1915). This applies to primary as well as general elections. See *United States* v. *Classic*, 313 U. S. 299 (1941).

That petitioners may have had no purpose to change the outcome of the federal election is irrelevant. The specific intent required under § 241 is not the intent to change the outcome of a federal election, but rather the intent to have false votes cast and thereby to injure the right of all voters in a federal election to express their choice of a candidate and to have their expressions of choice given full value and effect, without being diluted or distorted by the casting of fraudulent ballots. See *United States* v. *Saylor*, *supra*, at 386. As one court has stated:

> "The deposit of forged ballots in the ballot boxes, no matter how small or great their number, dilutes the influence of honest votes in an election, and whether in greater or less degree is immaterial. The right to an honest [count] is a right possessed by each voting elector, and to the extent that the importance of his vote is nullified, wholly or in part, he has been injured in the free exercise of a right or privilege secured to him by the laws and Constitution of the United States." *Prichard* v. *United States*, 181 F.

2d 326, 331 (CA6), aff'd due to absence of quorum, 339 U. S. 974 (1950).

Every voter in a federal primary election, whether he votes for a candidate with little chance of winning or for one with little chance of losing, has a right under the Constitution to have his vote fairly counted, without its being distorted by fraudulently cast votes. And, whatever their motive, those who conspire to cast false votes in an election for federal office conspire to injure that right within the meaning of § 241.[13]

While the District Court's jury instructions did not specifically focus upon the conspiracy to cast false votes for candidates for *federal* offices, no objection was made at trial or before the Court of Appeals with respect to this aspect of the instructions. See *Johnson* v. *United States*, 318 U. S. 189, 200 (1943); *Adickes* v. *S. H. Kress & Co.*, 398 U. S. 144, 147 n. 2 (1970). And, even assuming,

[13] We also find no merit in petitioners' contention that the indictment was unconstitutionally vague. The indictment states that on May 12, 1970, a primary election was held in Logan County, West Virginia, for the purpose of nominating candidates for the offices of United States Senator, Representative to Congress, and various state and county public offices. It then charges each of the defendants with conspiring to injure and oppress the qualified voters of Mount Gay precinct in the free exercise and enjoyment of their "right to vote for candidates for the aforesaid offices and to have such vote cast, counted, recorded, and certified at their full value and given full effect . . . ." The indictment further specifies that it was a part of the conspiracy "to cause fraudulent and fictitious votes to be cast in said precinct . . . ." Pet. for Cert. 3b. We think it plain that the indictment gave petitioners adequate notice of the specific charges against them. We also note, and petitioners themselves concede, that the form of the indictment was similar to those used in other § 241 prosecutions. See *United States* v. *Saylor*, 322 U. S. 385 (1944); *United States* v. *Kantor*, 78 F. 2d 710 (CA2 1935); *Walker* v. *United States*, 93 F. 2d 383 (CA8 1937); *Ledford* v. *United States*, 155 F. 2d 574 (CA6), cert. denied, 329 U. S. 733 (1946).

arguendo, that § 241 is limited to conspiracies to cast false votes for candidates for federal offices, we could find no plain error here. The prosecution's case, as indicated earlier, showed a single conspiracy to cast entire slates of false votes. The defense consisted in large part of a challenge to the credibility of the Government's witnesses, primarily the three unindicted coconspirators. The case therefore ultimately hinged on whether the jury would believe or disbelieve their testimony. Given the record, we think it inconceivable that, even if charged by more specific instructions, the jury could have found a conspiracy to cast false votes for local offices without finding a conspiracy to cast false votes for the federal offices as well.

This case is therefore an inappropriate vehicle for us to decide whether a conspiracy to cast false votes for candidates for state or local office, as opposed to candidates for federal office, is unlawful under § 241, and we intimate no views on that question.

Affirmed.

MR. JUSTICE DOUGLAS, with whom MR. JUSTICE BRENNAN concurs, dissenting.

Petitioners were convicted under 18 U. S. C. § 241, which imposes criminal penalties when "two or more persons conspire to injure . . . any citizen in the free exercise or enjoyment of any right or privilege secured to him by the Constitution . . . ." The Court of Appeals affirmed, 481 F. 2d 685, and this Court granted certiorari to consider whether a conspiracy to cast fraudulent votes in a state election, without any evidence of racial discrimination, could constitute a federal offense under § 241. The Court of Appeals reached the substance of this question, holding that the Federal Government had the power under § 241 to punish not only conspiracies to poison federal elections, but also conspiracies in which state officials took

part to cast false votes in a state or local election. 481 F. 2d, at 698–700. The Court today avoids the issue squarely presented by petitioners and by the decision of the Court of Appeals, concluding that it need not reach the issue because the evidence "bears out the verdict that each of the petitioners engaged in the conspiracy with the intent of having false votes cast for . . . federal officers."

After reviewing the record, I am left with the opinion that the Court, in affirming on the theory that petitioners agreed as a part of their conspiracy to have false votes cast for federal candidates, is convicting the petitioners for an offense for which they were not found guilty by the jury. The instructions to the jury were phrased in a fashion which did not require it to find intent to have false votes cast for federal candidates, so that there is in truth no "verdict" to that effect. The evidence of intent to have false votes cast for federal candidates is hardly conclusive, so that the failure of the charge to require such a finding could not be deemed harmless error. Fed. Rule Crim. Proc. 52 (a).

Because it is not clear that petitioners intended that fraudulent votes be cast for federal candidates, and because I believe that § 241 does not reach conspiracies to abscond with state elections, absent the element of racial discrimination, I dissent. The jury instructions, in allowing the jury to convict without finding a conspiracy to interfere with the federal electoral process, were improper, and the error was not harmless.

I

On May 12, 1970, a primary election was held in West Virginia for the purpose of nominating candidates for the United States Senate and House of Representatives and for various state and local offices, including that of County Commissioner for Logan County. The incumbent Com-

missioner, Okey Hager, and his challenger, Neal Scaggs, were engaged in a bitter contest for the Democratic nomination for Commissioner. The petitioners, including Okey Hager's son Red Hager, induced election officials, including Cecil Elswick, who later testified for the Government at this trial, to cast false votes for the Okey Hager slate on the voting machines in the Mount Gay, West Virginia, precinct. There is no evidence that the Okey Hager slate included any nominees for federal offices. As the Court acknowledges, "it is apparent from the record that the primary purpose behind the casting of false votes was to secure the nomination of Hager for the office of County Commissioner." The Court nonetheless finds that the conspiracy necessarily encompassed an agreement to cast fraudulent ballots for the federal offices.

As the Court notes, a stringent scienter requirement has been imposed when the Government seeks to prosecute under § 241, requiring proof of "specific intent" on the part of a conspirator to interfere with a right protected by § 241.[1] This standard has required proof that a conspirator acted "in open defiance or in reckless disregard of a constitutional requirement which has been made specific and definite," [2] in this case, the right to have votes cast in a *federal* election counted without impairment by fraudulent votes. It is against this exacting standard of *specific intent* that the actions of each of the conspirators in this case must be measured.

From the first, the prosecution in this case proceeded on the theory that casting false votes for state offices

[1] See *United States* v. *Guest*, 383 U. S. 745, 753–754; *id.*, at 785–786 (BRENNAN, J., concurring and dissenting); *United States* v. *Price*, 383 U. S. 787, 806 n. 20; *United States* v. *Williams*, 341 U. S. 70, 93–95 (DOUGLAS, J., dissenting); *Screws* v. *United States*, 325 U. S. 91, 101–107 (opinion of DOUGLAS, J.).

[2] *Id.*, at 105; see *United States* v. *Price*, *supra*, at 806 n. 20.

would constitute a violation of § 241. The indictment charged that on May 12, 1970, an election was held at Mount Gay to nominate candidates for the offices of United States Senator, Representative to Congress, and various state and county positions. It was charged that the petitioners willfully and knowingly conspired to injure voters in the exercise of their constitutional rights by impairing their right to vote for candidates "for the aforesaid offices" and to have such votes cast and certified at their full value. Thus the indictment charged a conspiracy in violation of § 241 without distinction between state and federal offices. Efforts on the part of the petitioners to clarify the charges against them were futile. The trial judge denied a motion to dismiss, which argued that the indictment failed to adequately particularize the alleged criminal violation. The petitioners also filed a motion for a bill of particulars which requested an elucidation of the specific acts which formed the basis of the indictment. This motion was also denied, and the case proceeded to trial with an indictment charging, as a federal crime, conspiracy to impair votes for not only federal, but also state offices.

The case was tried on the theory that petitioners conspired to secure the nomination of Okey Hager for County Commissioner. There is substantial evidence on the record to demonstrate the existence of this conspiracy, and petitioners necessarily contemplated having false votes cast in the local election to secure Okey Hager's nomination. There is also evidence that Cecil Elswick and others who were at the polling place during the election did in fact cast false votes for federal candidates. There is also evidence that one of the petitioners, Red Hager, did tell Elswick to cast false votes not only for Okey Hager, but also for Senator Byrd and Representative Hechler, candidates running for federal offices. But there

is no conclusive evidence in nearly 2,000 pages of transcript that any of the other four petitioners agreed, either with Elswick or with each other, to cast fraudulent votes for the federal candidates.[3]

The prosecution made clear in its closing argument to the jury that the essence of its case was the conspiracy to cast false votes for the local office of County Commissioner. It carefully focused the jury's attention on the fraud committed by the petitioners as regards the state election:

> "I think from the evidence you can conclude by now that the theory behind the government's case actually is that these votes were cast and counted by going through the contest and all in order to get Okey Hager elected to the County Court, in order to get Red Hager's father elected to the County Court, that these defendants, along with others, got the votes cast and got the votes counted in the long drawn-out procedure that was involved over there."

In its charge to the jury, the trial court reinforced this crucial error. In its instructions, reprinted in rele-

[3] Cecil Elswick, an unindicted coconspirator who was a witness for the Government, testified that petitioner W. Bernard Smith told him "how to win the election," but there is no evidence that Smith made any reference to casting false ballots for federal candidates.

Elswick also testified that there was a meeting the night before the election at which all of the petitioners were present and at which, the Court notes, Smith and Red Hager emphasized the need to put "all the votes" on the machine. The entire statement indicates that Hager and Smith were simply urging Elswick to cast as many votes as could be cast in the precinct, given the number of registered voters; it does not constitute an instruction to cast votes for federal candidates as well as the Okey Hager slate:

"Bernard and Red Hager was mostly spokesmen and Bernard said to be sure and put all the votes on there, put all of them on but fifty, and Red kept saying, 'Put them all on.'" Tr. 632.

vant part in the Appendix to this opinion, the Court never required the jury to find a specific intent to have false votes cast in the *federal* election contests on the part of each of the conspirators. Throughout its instructions to the jury, the District Court reiterated that the crucial element of the charged crime under § 241 was a conspiracy to "injure and oppress . . . voters . . . in the . . . enjoyment of . . . the right to vote and to have such votes cast, counted, recorded, and certified at full value." It stated:

> "You are instructed that the right to vote and the right to have the value of that vote undiminished and undiluted by the presence of illegal votes is a right guaranteed by the Constitution and laws of the United States within the context of [18 U. S. C. § 241].
>
> . . . . . .
>
> ". . . [I]f any one or more of the defendants conspired knowingly and intentionally with another defendant or with a co-conspirator to produce the casting and counting of illegal ballots in the 1970 primary election, with the intention of injury or oppressing citizens in the free exercise of their voting rights, they would be guilty as charged in this indictment."

At no time was the jury told that specific intent to have false votes cast for the *federal* candidates was necessary for conviction of each of the conspirators; it was enough that the "right to vote" was diluted and that "illegal ballots" were cast to injure "voting rights," without distinction between federal and state elections. As long as the jury accepted the credibility of the prosecution witnesses, conviction under these instructions was inevitable, even for those petitioners who were not shown by any

conclusive evidence to have had specific intent to interfere with the federal election, the ground on which the Court affirms.

While trial counsel did not object to the form of the instructions, where an error is so fundamental that the instruction does not properly submit to the jury the essential elements of the charged offense, there is plain error and the interests of justice and fair play demand that we take note. See *Fisher* v. *United States*, 328 U. S. 463, 467–468; *Screws* v. *United States*, 325 U. S. 91, 107 (opinion of DOUGLAS, J.); Fed. Rule Crim. Proc. 52 (b).

The Court concedes that the jury instructions "did not specifically focus" on an intent to cast false votes for federal candidates, but avoids this problem by contending in effect that this error was harmless because "we think it *inconceivable* that, even if charged by more specific instructions, the jury could have found a conspiracy to cast false votes for local offices without finding a conspiracy to cast false votes for the federal offices as well." (Emphasis added.)

I cannot agree with this crucial assumption. The gravamen of a conspiracy charge is agreeing with the intent of achieving a certain proscribed objective. "[I]t is . . . essential to determine what kind of agreement or understanding existed as to *each* defendant." *United States* v. *Borelli*, 336 F. 2d 376, 384 (Friendly, J.) (emphasis added); see Note, Developments in the Law—Criminal Conspiracy, 72 Harv. L. Rev. 920, 929–930. When it is not shown that the unlawful objectives of one individual have been adopted by another, the latter cannot be found to have agreed to achieve the objectives and a conspiracy count to do so cannot be sustained. See *Yates* v. *United States*, 354 U. S. 298, 329–331.

The evidence in this case, as the prosecutor observed in closing argument, demonstrated that petitioners focused

their attention on the contest for County Commissioner. There is no conclusive evidence that the casting of fraudulent federal ballots was in fact necessary to petitioners' scheme to abscond with the local nomination contest, or that petitioners thought it necessary. There is no proof that a lower quantum of votes for the federal candidates would have aroused suspicion, or that petitioners felt that it would.[4] Ballot splitting, with disparate numbers of votes cast for the various offices, was prevalent at this election.[5] The nominations for County Commissioner and other local offices were closely contested, while the federal nominations were not, so that there would naturally be more votes cast in the local races.[6] And even if we assume that a sophisticated conspirator would have considered it necessary to stuff the federal ballot box in order to conceal fraud in the state election, we simply cannot presume that the petitioners did also. The record reveals an unsophisticated, bludgeonlike effort to win the election for Okey Hager, with minimal preliminary attention to the niceties of covering up the fraud. When there is no conclusive evidence that the need to cast fraudulent federal votes even crossed the minds of four of the five petitioners,

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[4] See n. 3, *supra*.

[5] For example, 375 votes were recorded in the Mount Gay precinct for County Commissioner (long term), 371 for Justice of the Peace and Constable, but only 348 for United States Senator and 328 for United States Representative.

[6] The countywide totals in the Hager-Scaggs County Commissioner's race had Hager the winner by only 21 votes, and the result would have been reversed without the returns from Mount Gay. On the federal level, Senator Byrd and Representative Hechler were apparently running virtually unopposed for renomination. In Mount Gay, supporters of both Hager and Scaggs voted for these two federal incumbents, and Byrd won Mount Gay by a vote of 346 to six and Hechler by a vote of 318 to 10.

it is the jury's province, not ours, to determine whether there was specific intent to cast such votes.

The slenderness of the reed on which the Court's affirmance of these convictions rests is demonstrated by its assertions that the jury "could believe" that the lack of discussion of federal ballots only reflected an "assumption" by petitioners that such ballots would have to be cast, and that the jury "could have inferred" that petitioners were motivated by the need to cast false federal ballots to conceal fraudulent local votes. But whether the jury "could have inferred" or "could [have] believe[d]" that there was sufficient proof of specific intent to cast false federal ballots in the evidence in this case misses the point, because the jury was never required to make this finding in order to convict. The jury verdict is not to be accorded its traditional sanctity, when it is premised on erroneous instructions. See *Burton* v. *United States*, 202 U. S. 344, 373–374. The jury has never passed on the question of petitioners' intent while guided by proper instructions. While circumstantial evidence may lead a jury to infer specific intent to interfere with a right protected by § 241, the weighing of the evidence should be the jury's task, not that of this Court. There was in fact no "verdict" that petitioners conspired to have false votes cast in the federal election, and the sparse circumstantial evidence in this case makes it impossible for me to conclude, as does the Court, that such a verdict was inevitable so that the error in jury instructions was harmless. At the very least, justice requires that this case be remanded for a new trial.

II

Because I cannot agree that the evidence showed that petitioners necessarily conspired with the specific intent of having false votes cast for federal candidates, I could

affirm only if § 241 reached a conspiracy by local officials to cast fraudulent votes in nominating candidates for local offices where, as here, there was no evidence of racial discrimination. I do not, however, believe that § 241 can properly be construed in such a fashion.

The Court of Appeals determined that § 241 did reach such conspiracies. It noted that the language of the section sweeps broadly to guarantee " 'any right or privilege secured . . . by the Constitution or laws of the United States,' " 481 F. 2d, at 699, and also that *United States* v. *Guest*, 383 U. S. 745, and *United States* v. *Price*, 383 U. S. 787, stated that § 241 proscribed conspiracies to violate Fourteenth Amendment rights, including those protected from interference under color of law by the Equal Protection Clause. One such right only recently defined, reasoned the Court of Appeals, is the right not to have valid votes cast in state elections diluted by those acting under color of state law, including local election officials such as those involved in the instant conspiracy, citing *Reynolds* v. *Sims*, 377 U. S. 533. Thus in the view of the Court of Appeals, a conspiracy to cast fraudulent ballots in which state election officials took part resulted in a denial of equal protection under color of state law and stated a crime under § 241, even if the conspiracy did not encompass a federal election. 481 F. 2d, at 698–700.

The argument ignores the intent of Congress as manifested by the legislative history of § 241. Congress did not intend to reach local election malfeasance where there was no evidence of racial bias because it did not believe that it had that power. It expressed unwillingness to interfere with the right of States to control their own elections where there was no racial discrimination.

Section 241 was originally passed as § 6 of the Enforcement Act of 1870, 16 Stat. 141. The Enforcement Act was a comprehensive body of legislation passed two

months after the ratification of the Fifteenth Amendment, which protected the right of citizens to vote from denial by the Federal or State Governments "on account of race, color, or previous condition of servitude." The Fifteenth Amendment authorized Congress "to enforce this article by appropriate legislation." This latter clause was the impetus for the Act.

What is now § 241 was offered as an amendment by Senator Pool of North Carolina, who referred in introducing the amendment to "rights which are conferred upon the citizen by the fourteenth amendment." Cong. Globe, 41st Cong., 2d Sess., 3611. But there is no proof that he conceived of the possibility that the amendment could reach local election fraud where there was no racial discrimination.[7] On the other hand, the rest of the legislative history of the Enforcement Act demonstrates that Congress, in adopting Pool's amendment, could not have intended to reach such frauds, because it did not believe that it had that power.

Because the Enforcement Act of 1870 was concerned primarily with suffrage, there is ample legislative history elucidating the reach of congressional power regarding both federal and local elections. The constitutional power to pass those sections of the Act which purported to deal with the right to vote in local elections was perceived to flow from the Fifteenth Amendment,[8] which protected the right to vote from infringement only "on account of race, color, or previous condition of servitude." Even the staunchest supporters of the Act conceded that, absent the critical element of racial discrimination, the Act could not reach local elections. The following collo-

[7] Senator Pool's remarks are reprinted in full in the appendix to *United States* v. *Price*, 383 U. S., at 807–820.

[8] See, *e. g.*, Cong. Globe, 41st Cong., 2d Sess., 3503 (Rep. Bingham); *id.*, at 3559 (Sen. Stewart); *id.*, at 3564 (Sen. Pool); *id.*, at 3567 (Sen. Stockton).

quy, for example, occurred between Senator Edmunds of Vermont, one of two Senate floor managers of the Act, *id.*, at 3753, and Senator Morton of Indiana, another supporter of the Act. While interference with local elections could be punished if racial discrimination, against either white or black, was extant, local election fraud could not otherwise be reached by federal jurisdiction:

> "Mr. MORTON. . . . Our theory is that the question of suffrage is under the control of the States, and was left to the several States by the Constitution of the United States; and that being the case, Congress had no power to pass a law conferring suffrage on colored men, and it was necessary to amend the Constitution of the United States for that purpose. We therefore provided in the fifteenth amendment that 'the right of citizens of the United States to vote shall not be denied or abridged by the United States, or by any State, on account of race, color, or previous condition of servitude.' The proposition to which I call attention is this: that the question of suffrage is now, as it was before, completely under the control of the several States to punish violations of the right of suffrage, just as they had the power before, except that we take away their power to deny suffrage on account of race, color, or previous condition of servitude, and have given to Congress the power to enforce this amendment.
>
> "The question now to which I call the attention of the Senate is whether it is in the power of Congress to make provision for punishing violations of the right of suffrage except those violations go to the question of color, race, or previous condition of servitude.
>
> "Mr. EDMUNDS. But it does not make any difference what the color is, black or white.

"Mr. MORTON. Not a bit. It does not make any difference which; but if a man is denied the right of suffrage because he is a white man, if any state shall assume to deny a man the right of suffrage because he is a white man, then we have a right to interfere; or if because he is a colored man, then we have a right to interfere. But suppose the denial of the right of suffrage by a board of registration or a board of inspectors has nothing whatever to do with color; suppose it is for an offense that existed by State law before the enactment of this fifteenth amendment, what power have we got to interfere with that any more than we had before?

"Mr. EDMUNDS. Nobody, I think, would claim that we have. I should not say so." Cong. Globe, 41st Cong., 2d Sess., 3571.

In the course of debate, Senator Sherman of Ohio, another ardent advocate of the Act, proposed an amendment to add three sections to it. These sections, which were adopted with slight changes as §§ 19, 20, and 21, were designed to deal with frauds not involving racial discrimination, but only in *federal* elections. Senator Sherman's comments express the desire not to "invade the right of any state," *id.*, at 3664, to control its own elections and reflect the belief that an element of racial bias was considered a necessary precondition to congressional power to deal with state elections. Federal elections for Senators and Congressmen could be governed absent such bias, but only by virtue of the express authority of Art. I, § 4, of the Constitution.[9] In describing

[9] Article I, § 4, provides: "The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations, except as to the Places of chusing Senators." Sherman's amendment orig-

these amendments to the House after their adoption by the Senate, Representative Bingham of Ohio, the floor manager of the Act in the House, stated:

"The amendments proposed to prevent fraudulent registration or fraudulent voting, in so far as

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inally provided also for regulation of Presidential electors, but this provision was quickly deleted when it was pointed out that Congress was without constitutional power to include it. Cong. Globe, 41st Cong., 2d Sess., 3670.

In proposing the amendments, Sherman stated:

"[Senator Thurman] admits that Congress has a right by appropriate legislation to prevent any State from discriminating against a voter on account of his race, color, or previous condition of servitude. That is all, I believe, that is claimed by any one on this side of the Chamber as to the authority conferred by the fifteenth amendment. . . .

. . . . . .

"But, Mr. President, there is one other grievance that I feel ought to be dealt with at this moment, as we have this bill before us; a grievance which has become of greater magnitude even than the denial of the right to vote to colored people; and that is, the open, glaring, admitted frauds by wholesale in the great cities of this country, by which our Government is about to be subverted. . . . We have official documents without number in both Houses of Congress showing the growing evil of trampling down the rights of communities and States to representation in Congress in the election of members of Congress and in the election of Senators. . . .

". . . There can be no doubt about the constitutional power of Congress in this particular, because it is in plain accordance with the provisions of the Constitution which authorize Congress to change and alter the mode and manner of electing members of Congress [Art. I, § 4] . . . . As I have said, they have received the sanction of a committee of the House, which has carefully examined the whole subject, and I do not believe they raise any constitutional question, or invade the right of any State.

. . . . . .

"In my judgment in elections for officers of the national Government we can prescribe, under the Constitution, the mode and manner and qualification of voters." *Id.*, at 3663–3664.

> I am advised, do not alter any of the existing regulations of the States touching registration; they are but a simple exercise of the power expressly conferred on the Congress of the United States to regulate elections of members and Delegates to Congress. They are expressly limited to elections of those officers. I do not deem it important to say anything further on that point." Cong. Globe, 41st Cong., 2d Sess., 3872.

Only nine months later, the same Congress which passed the Enforcement Act of 1870 passed the Force Act of 1871, 16 Stat. 433, which supplemented the 1870 Act by supplying independent federal enforcement machinery to affirmatively ensure the right to vote in all congressional elections. Federal election officials were appointed to supervise such elections; the normal state processes were suppressed. But Congress made clear that its power could attach only when needed to protect congressional elections. One of the supporters of the bill, Representative Churchill of New York, stated:

> "But, Mr. Speaker, for some years past grave doubts have prevailed in different portions of this country as to whether the declared results of elections have truly expressed the will of the people. With regard to officers of States and officers of minor communities this doubt, so far as it exists, is left to be determined, as it can only be determined, by the laws existing in those States or communities. But so far as regards members of the Congress of the United States, although the first legislation in regard to the matter is intrusted by the Constitution of the United States to the States themselves, the power is properly reserved to Congress itself to determine by what rules these elections shall be conducted . . . ." Cong. Globe, 41st Cong., 3d Sess., 1274.

In the same vein, Representative Bingham, who as noted was a floor manager of the 1870 Act, again reflected caution about interfering with the responsibility of the States to manage their own elections, asserting:

> "I am willing that the issue shall be made up, and let the people speak upon this question. The bill interferes with no reserved rights of the States. If the States do not choose to hold their elections on the same day for mere State officials, be it so; but with regard to the vote for Representatives in Congress, I take it that the great majority of the people of every State in the Union will admit that the nation has a right to be represented at every election for Congress by its own law and by its own officials as well as the State. I have given the words, the thoughtful words of the makers of the Constitution in support of that right. No law of any State by this bill is in any manner wrongfully impaired." *Id.*, at 1284.[10]

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[10] See also the remarks of Representative Lawrence of Ohio:

"Mr. LAWRENCE. . . . And if the States have failed to enact laws necessary to secure what we all, I trust, have so much at heart, to wit, the purity of the ballot-box, or have failed to execute those already enacted, then it is the highest duty of this Congress to intervene and protect the citizens of the United States in the enjoyment of the elective franchise against force and fraud in the election of Representatives in Congress, leaving the States to provide such legislation as they may deem necessary in the election of local and State officers.

. . . . . .

"It will reach any officer who improperly tampers with the election of a Representative in Congress; but it does not reach any State officer or any citizen in connection with any local or State election.

. . . . . .

"Mr. JONES, of Kentucky. I have not read all the provisions of this bill, and as the gentleman seems to have done so I desire to

Thus, while the concurrent nomination races for federal officers in the Mount Gay precinct provided an opportunity for petitioners to violate § 241, that violation could occur only if the petitioners possessed the specific intent to cast fraudulent votes in the federal elections as an object of their conspiracy.

The broad language of *Guest* and *Price* does not authorize us to draw any other conclusion. *Guest* involved racial discrimination and rights under the Equal Protection Clause "firmly and precisely established by a consistent line of decisions in this Court." 383 U. S., at 754. That is not true of the right to be free from fraud without any racial connotation in local elections. In *Price*, we noted the sparse legislative history of § 241 as part of the Enforcement Act, and held that there was no indication that Congress did not intend it to reach the Fourteenth Amendment right in question, the right to due process. 383 U. S., at 801. We noted that the application of § 241 in that case "does not raise fundamental questions of federal-state relationships." *Id.*, at 806. Those facts are not present in this case. There is legislative history which indicates that Congress did not intend to reach local election frauds in passing § 241, because it did not believe that it had that power. And the decision of the Court of Appeals reaches to the very heart of federal-state relations, permitting federal intrusion in even the most local election, intrusions which the 41st Congress attempted to avoid when passing the Enforcement Act of 1870 and the Force Act of 1871.

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ask him whether they apply to other elections than those for members of Congress?

"Mr. LAWRENCE. They apply only to the elections for Representatives and Delegates to Congress. The bill does not propose to interfere with State elections at all." Cong. Globe, 41st Cong., 3d Sess., 1276.

While the civil protections of the Fourteenth Amendment reach state elections even where there is no racial animus, criminal laws such as 18 U. S. C. § 241 must be strictly construed, and we have required that Congress "plainly and unmistakably" assert federal criminal jurisdiction over an activity. See *United States* v. *Bass,* 404 U. S. 336, 348; *United States* v. *Gradwell,* 243 U. S. 476, 485. Here Congress did not plainly intend § 241 to reach local elections frauds, and apparently intended quite the opposite. "[B]ecause of the seriousness of criminal penalties, and because criminal punishment usually represents the moral condemnation of the community, legislatures and not courts should define criminal activity. This policy embodies 'the instinctive distaste against men languishing in prison unless the lawmaker has clearly said they should.'" *United States* v. *Bass, supra,* at 348.

I can affirm neither on the theory that § 241 reaches state election frauds where there is no evidence of racial discrimination, nor on the theory adopted by the Court that it was "inconceivable" that petitioners did not specifically intend to have false votes cast in the federal election, with the exception of Red Hager. The other petitioners are entitled at least to a new trial under proper instructions.

APPENDIX TO OPINION OF DOUGLAS, J., DISSENTING

Excerpts from Jury Instructions

The indictment in this case charges in substance that beginning on or about the 1st day of May, 1970 and continuing until on or about the date of the indictment the defendants unlawfully, willfully and knowingly conspired with each other and with other persons who are both known and unknown to the grand jury, to injure and op-

press the qualified voters of Logan County in the free exercise and enjoyment of certain rights and privileges secured to them by the Constitution and the laws of the United States, that is, the right to vote and to have such votes cast, counted, recorded and certified at full value.

The indictment also alleges that in order to effect the objects of the conspiracy the defendants caused and attempted to cause votes to be cast in the Mount Gay precinct of Logan County by procedures and methods in violation of the laws of the State of West Virginia, all with the purpose and intent that the illegal, fraudulent and fictitious ballots would be counted, returned and certified as a part of the total vote cast in the May 12, 1970, primary election, thereby impairing, diminishing, diluting and destroying the value and effect of votes legally, properly and honestly cast in that primary election in Logan County, which the indictment alleges violates Title 18 of the United States Code, Section 241.

The statute cited in the indictment provides in part that it shall be a criminal offense for two or more persons to conspire to injure any citizen in the free exercise or enjoyment of any right or privilege secured to him by the Constitution or laws of the United States. You are instructed that the right to vote and the right to have the value of that vote undiminished and undiluted by the presence of illegal votes is a right guaranteed by the Constitution and laws of the United States within the context of the charging statute.

The indictment in this case states that the defendants caused false and fictitious votes to be cast and counted, and that casting and counting such votes violates the laws of the State of West Virginia. With regard to whether or not casting and counting false and fictitious votes or causing them to be cast and counted violates West Virginia law, you are further instructed that the laws of the

State of West Virginia are violated when fictitious votes are cast and counted or caused to be cast and counted.

The government in essence contends that these defendants, along with other co-conspirators not named as defendants in the indictment, including Elwood Sloan, Cecil Elswick, Calvin Napier, Mae Stollings, Minerva Richards, Janet Sullins and perhaps others, did unlawfully, willfully and knowingly conspire together and with each other to violate the law of the United States in causing or attempting to cause votes to be cast in the Mount Gay precinct of Logan County, West Virginia, in the May 1970 primary election by procedures and methods in violation of the laws of West Virginia pertaining to the handling of a precinct by election officials, and by further causing and attempting to cause the County Court of Logan County, West Virginia, to find that no illegal votes were cast in the Mount Gay precinct by soliciting perjury and the commission of perjury in an election contest held subsequent to the May 12, 1970, primary, all with the purpose and intent that the alleged illegal and fraudulent and fictitious votes would be counted as a part of the total vote cast, resulting in an impairment, lessening and dilution of the value and effect of the votes legally and honestly cast. The government contends, of course, that all this was done in violation of Title 18, Section 241 of the United States Code, the charging statute designated in the indictment.

. . . . .

The Court further tells you that intent is an essential element of this offense. You are therefore charged that before you can convict the defendants, or any of them, you must believe beyond a reasonable doubt that such defendant or defendants deliberately and with knowledge conspired with others to injure certain qualified voters in the free exercise and enjoyment of their right of suffrage.

Now, it is a legal presumption that people intend the natural and probable consequences of their acts, and also that they know that the right of legally qualified persons to vote is a federally Constitutionally protected right, and consequently, if any one or more of the defendants conspired knowingly and intentionally with another defendant or with a co-conspirator to produce the casting and counting of illegal ballots in the 1970 primary election, with the intention of injury or oppressing citizens in the free exercise of their voting rights, they would be guilty as charged in this indictment.

HOWARD JOHNSON CO., INC. *v.* DETROIT LOCAL JOINT EXECUTIVE BOARD, HOTEL & RESTAURANT EMPLOYEES & BARTENDERS INTERNATIONAL UNION, AFL–CIO

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

No. 73–631. Argued March 19–20, 1974—Decided June 3, 1974

Petitioner purchased the assets of a restaurant and motor lodge under an agreement whereby the sellers, who had been operating the enterprises under franchises from petitioner, retained the real property and leased it to petitioner, and petitioner expressly did not assume any of the sellers' obligations, including those under any collective-bargaining agreement. Deciding to hire its own work force to operate the enterprises, petitioner hired 45 employees, but only nine of the sellers' 53 former employees and none of the former supervisors. Respondent Union, which had collective-bargaining agreements with the sellers containing arbitration provisions, filed an action under § 301 of the Labor Management Relations Act, claiming that petitioner's failure to hire all the sellers' employees constituted a "lockout" in violation of the agreements and seeking injunctive relief and an order compelling petitioner and the sellers to arbitrate the extent of their obligations to the sellers' employees under the agreements. The District Court held that petitioner was required to arbitrate, but denied the union's motion for a preliminary injunction requiring petitioner to hire all of the sellers' employees. The Court of Appeals affirmed the order compelling petitioner to arbitrate. *Held:* Petitioner was not required to arbitrate with the union in the circumstances of this case, since there was plainly no substantial continuity of identity in the work force hired by petitioner with that of the sellers, and no express or implied assumption of the agreement to arbitrate. *John Wiley & Sons* v. *Livingston*, 376 U. S. 543, distinguished. Petitioner had the right not to hire any of the sellers' employees, if it so desired, *NLRB* v. *Burns Security Services*, 406 U. S. 272, and this right cannot be circumvented by the union's asserting its claims in a § 301 suit to compel arbitration rather than in an unfair labor practice context. Pp. 253–265.

482 F. 2d 489, reversed.

MARSHALL, J., delivered the opinion of the Court, in which BURGER, C. J., and BRENNAN, STEWART, WHITE, BLACKMUN, POWELL, and REHNQUIST, JJ., joined. DOUGLAS, J., filed a dissenting opinion, *post*, p. 265.

James D. Tracy argued the cause and filed briefs for petitioner.

Laurence Gold argued the cause for respondent. With him on the briefs were *Jerry F. Venn, Donald Sugerman,* and *George Kaufmann.**

MR. JUSTICE MARSHALL delivered the opinion of the Court.

Once again we are faced with the problem of defining the labor law obligations of a "successor" employer to the employees of its predecessors. In this case, petitioner Howard Johnson Co. is the bona fide purchaser of the assets of a restaurant and motor lodge. Respondent Union was the bargaining representative of the employees of the previous operators, and had successfully concluded collective-bargaining agreements with them. In commencing its operation of the restaurant, Howard Johnson hired only a small fraction of the predecessors' employees. The question presented in this case is whether the Union may compel Howard Johnson to arbitrate, under the arbitration provisions of the collective-bargaining agreements signed by its predecessors, the extent of its obligations under those agreements to the predecessors' employees.

Prior to the sale at issue here, the Grissoms—Charles T. Grissom, P. L. Grissom, Ben Bibb, P. L. Grissom & Son,

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**Gerard C. Smetana, Jerry Kronenberg,* and *Milton Smith* filed a brief for the Chamber of Commerce of the United States as *amicus curiae* urging reversal.

Thomas E. Harris filed a brief for the American Federation of Labor and Congress of Industrial Organizations as *amicus curiae* urging affirmance.

Inc., and the Belleville Restaurant Co., a corporation wholly owned by P. L. Grissom & Son—had operated a Howard Johnson's Motor Lodge and an adjacent Howard Johnson's Restaurant in Belleville, Michigan, under franchise agreements with the petitioner. Employees at both the restaurant and motor lodge were represented by the respondent Hotel & Restaurant Employees & Bartenders International Union.[1] The Grissoms had entered into separate collective-bargaining agreements with the Union covering employees at the two establishments. Both agreements contained dispute settlement procedures leading ultimately to arbitration. Both agreements also provided that they would be binding upon the employer's "successors, assigns, purchasers, lessees or transferees."

On June 16, 1972, the Grissoms entered into an agreement with Howard Johnson to sell it all of the personal property used in connection with operation of the restaurant and motor lodge. The Grissoms retained ownership of the real property, leasing both premises to Howard Johnson. Howard Johnson did not agree to assume any of the Grissoms' obligations, except for four specific contracts relating to operation of the restaurant and motor lodge. On June 28, Howard Johnson mailed the Grissoms a letter, which they later acknowledged and confirmed, clarifying that "[i]t was understood and agreed that the Purchaser . . . would not recognize and assume any labor agreements between the Sellers . . . and any

[1] Actually, employees at the restaurant were officially represented by the Hotel & Restaurant Employees & Bartenders International Union, while employees at the motor lodge were represented by Local 705 of the Hotel, Motel & Restaurant Employees Union. As the Court of Appeals observed, however, "[w]hile the unions named in the two agreements bear distinct names they are apparently identical in interest and governance." 482 F. 2d 489, 491 n. 3. Both have been represented throughout this litigation by the respondent Detroit Local Joint Executive Board.

labor organizations," and that it was further agreed that "the Purchaser does not assume any obligations or liabilities of the Sellers resulting from any labor agreements . . . ."

Transfer of operation of the restaurant and motor lodge was set for midnight, July 23, 1972. On July 9, the Grissoms notified all of their employees that their employment would terminate as of that time. The Union was also notified of the termination of the Grissoms' business. On July 11, Howard Johnson advised the Union that it would not recognize the Union or assume any obligations under the existing collective-bargaining agreements.

After reaching agreement with the Grissoms, Howard Johnson began hiring its own work force. It placed advertisements in local newspapers, and posted notices in various places, including the restaurant and motor lodge. It began interviewing prospective employees on July 10, hired its first employees on July 18, and began training them at a Howard Johnson facility in Ann Arbor on July 20. Prior to the sale, the Grissoms had 53 employees. Howard Johnson commenced operations with 45 employees, 33 engaged in the restaurant and 12 in the motor lodge. Of these, only nine of the restaurant employees and none of the motor lodge employees had previously been employed by the Grissoms. None of the supervisory personnel employed by the Grissoms were hired by Howard Johnson.

The Union filed this action in the state courts on July 21. Characterizing Howard Johnson's failure to hire all of the employees of the Grissoms as a "lockout" in violation of the collective-bargaining agreements, the Union sought a temporary restraining order enjoining this "lockout" and an order compelling Howard Johnson and the Grissoms to arbitrate the extent of their obliga-

tions to the Grissom employees under the bargaining agreements. The state court granted an *ex parte* temporary restraining order, but the Company refused to honor it, claiming that it had not received adequate notice or service, and the order was dissolved after a hearing on July 24.

The defendants subsequently removed this action to the federal courts on the ground that it was brought under § 301 of the Labor Management Relations Act, 29 U. S. C. § 185. At a hearing before the District Court on August 7, the Grissoms admitted that they were required to arbitrate in accordance with the terms of the collective-bargaining agreements they had signed and that an order compelling arbitration should issue. On August 22, the District Court, in a memorandum opinion unofficially reported at 81 L. R. R. M. 2329 (ED Mich. 1972), held that Howard Johnson was also required to arbitrate the extent of its obligations to the former Grissom employees. The court denied, however, the Union's motion for a preliminary injunction requiring the Company to hire all the former Grissom employees, and granted a stay of its arbitration order pending appeal. Howard Johnson appealed the order compelling arbitration, but the Court of Appeals affirmed. 482 F. 2d 489 (CA6 1973). We granted certiorari, 414 U. S. 1091 (1973), to consider the important labor law question presented. We reverse.

Both courts below relied heavily on this Court's decision in *John Wiley & Sons* v. *Livingston,* 376 U. S. 543 (1964). In *Wiley,* the union representing the employees of a corporation which had disappeared through a merger sought to compel the surviving corporation, which had hired all of the merged corporation's employees and continued to operate the enterprise in a substantially identical form after the merger, to arbitrate

under the merged corporation's collective-bargaining agreement. As *Wiley* was this Court's first experience with the difficult "successorship" question, its holding was properly cautious and narrow:

> "We hold that the disappearance by merger of a corporate employer which has entered into a collective bargaining agreement with a union does not automatically terminate all rights of the employees covered by the agreement, and that, in appropriate circumstances, present here, the successor employer may be required to arbitrate with the union under the agreement." *Id.*, at 548.

Mr. Justice Harlan, writing for the Court, emphasized "the central role of arbitration in effectuating national labor policy" and preventing industrial strife, and the need to afford some protection to the interests of the employees during a change of corporate ownership. *Id.*, at 549.

The courts below recognized that the reasoning of *Wiley* was to some extent inconsistent with our more recent decision in *NLRB* v. *Burns International Security Services,* 406 U. S. 272 (1972). Burns was the successful bidder on a contract to provide security services at a Lockheed Aircraft plant, and took a majority of its employees from the ranks of the guards employed at the plant by the previous contractor, Wackenhut. In refusing to enforce the Board's order finding that Burns' failure to honor the substantive provisions of the collective-bargaining agreement negotiated with Wackenhut was an unfair labor practice, we emphasized that freedom of collective bargaining—" 'private bargaining under governmental supervision of the procedure alone, without any official compulsion over the actual terms of the contract' "—was a " 'fundamental premise' " of the federal labor laws, *id.*, at 287, quoting *H. K. Porter Co.* v. *NLRB,*

397 U. S. 99, 108 (1970), and that it was therefore improper to hold Burns to the substantive terms of a collective-bargaining agreement which it had neither expressly nor impliedly assumed. *Burns* also stressed that holding a new employer bound by the substantive terms of the preexisting collective-bargaining agreement might inhibit the free transfer of capital, and that new employers must be free to make substantial changes in the operation of the enterprise. 406 U. S., at 287–288.

The courts below held that *Wiley* rather than *Burns* was controlling here on the ground that *Burns* involved an NLRB order holding the employer bound by the substantive terms of the collective-bargaining agreement, whereas this case, like *Wiley*, involved a § 301 suit to compel arbitration. Although this distinction was in fact suggested by the Court's opinion in *Burns*, see *id.*, at 285–286, we do not believe that the fundamental policies outlined in *Burns* can be so lightly disregarded. In *Textile Workers* v. *Lincoln Mills*, 353 U. S. 448 (1957), this Court held that § 301 of the Labor Management Relations Act authorized the federal courts to develop a federal common law regarding enforcement of collective-bargaining agreements. But *Lincoln Mills* did not envision any freewheeling inquiry into what the federal courts might find to be the most desirable rule, irrespective of congressional pronouncements. Rather, *Lincoln Mills* makes clear that this federal common law must be "fashion[ed] from the policy of our national labor laws." *Id.*, at 456. MR. JUSTICE DOUGLAS described the process of analysis to be employed:

> "The Labor Management Relations Act expressly furnishes some substantive law. It points out what the parties may or may not do in certain situations. Other problems will lie in the penumbra of express statutory mandates. Some will lack express statu-

> tory sanction but will be solved by looking at the policy of the legislation and fashioning a remedy that will effectuate that policy." *Id.*, at 457.

It would be plainly inconsistent with this view to say that the basic policies found controlling in an unfair labor practice context may be disregarded by the courts in a suit under § 301, and thus to permit the rights enjoyed by the new employer in a successorship context to depend upon the forum in which the union presses its claims.[2] Clearly the reasoning of *Burns* must be taken into account here.

We find it unnecessary, however, to decide in the circumstances of this case whether there is any irreconcilable conflict between *Wiley* and *Burns*. We believe that even on its own terms, *Wiley* does not support the decision of the courts below. The Court in *Burns* recognized that its decision "turn[ed] to a great extent on the precise facts involved here." 406 U. S., at 274. The same observation could have been made in *Wiley*, as indeed it could be made in this case. In our development of the federal common law under § 301, we must necessarily proceed cautiously, in the traditional case-by-case approach of the common law. Particularly in light of the difficulty of the successorship question, the myriad factual circumstances and legal contexts in which it can arise, and the absence of congressional guidance as to its resolution, emphasis on the facts of each case as it arises is especially appropriate. The Court was obviously well aware of this in *Wiley*, as its guarded, almost tentative statement of its holding amply demonstrates.

When the focus is placed on the facts of these cases, it

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[2] See The Supreme Court, 1971 Term, 86 Harv. L. Rev. 1, 255–256 (1972); Christensen, Successorships, Unit Changes, and the Bargaining Table, in Southwestern Leg. Found., 19th Institute on Labor Law, Labor Law Developments 1973, pp. 197, 205–206.

becomes apparent that the decision below is an unwarranted extension of *Wiley* beyond any factual context it may have contemplated. Although it is true that both *Wiley* and this case involve § 301 suits to compel arbitration, the similarity ends there. *Wiley* involved a merger, as a result of which the initial employing entity completely disappeared. In contrast, this case involves only a sale of some assets, and the initial employers remain in existence as viable corporate entities, with substantial revenues from the lease of the motor lodge and restaurant to Howard Johnson. Although we have recognized that ordinarily there is no basis for distinguishing among mergers, consolidations, or purchases of assets in the analysis of successorship problems, see *Golden State Bottling Co.* v. *NLRB,* 414 U. S. 168, 182–183, n. 5 (1973), we think these distinctions are relevant here for two reasons. First, the merger in *Wiley* was conducted "against a background of state law that embodied the general rule that in merger situations the surviving corporation is liable for the obligations of the disappearing corporation," *Burns,* 406 U. S., at 286, which suggests that holding Wiley bound to arbitrate under its predecessor's collective-bargaining agreement may have been fairly within the reasonable expectations of the parties. Second, the disappearance of the original employing entity in the *Wiley* merger meant that unless the union were afforded some remedy against Wiley, it would have no means to enforce the obligations voluntarily undertaken by the merged corporation, to the extent that those obligations vested prior to the merger or to the extent that its promises were intended to survive a change of ownership. Here, in contrast, because the Grissom corporations continue as viable entities with substantial retained assets, the Union does have a realistic remedy to enforce their contractual obligations. Indeed, the Gris-

soms have agreed to arbitrate the extent of their liability to the Union and their former employees; presumably this arbitration will explore the question whether the Grissoms breached the successorship provisions of their collective-bargaining agreements, and what the remedy for this breach might be.[3]

Even more important, in *Wiley* the surviving corporation hired *all* of the employees of the disappearing corporation. Although, under *Burns*, the surviving corporation may have been entitled to make substantial changes in its operation of the enterprise, the plain fact is that it did not. As the arbitrator in *Wiley* subsequently stated:

> "Although the Wiley merger was effective on October 2, 1961, the former Interscience employees continued to perform the same work on the same products under the same management at the same work place as before the change in the corporate employer." *Interscience Encyclopedia, Inc.*, 55 Lab. Arb. 210, 218 (1970).[4]

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[3] The Union apparently did not explore another remedy which might have been available to it prior to the sale, *i. e.*, moving to enjoin the sale to Howard Johnson on the ground that this was a breach by the Grissoms of the successorship clauses in the collective-bargaining agreements. See *National Maritime Union* v. *Commerce Tankers Corp.*, 325 F. Supp. 360 (SDNY 1971), vacated, 457 F. 2d 1127 (CA2 1972). The mere existence of the successorship clauses in the bargaining agreements between the Union and the Grissoms, however, cannot bind Howard Johnson either to the substantive terms of the agreements or to the arbitration clauses thereof, absent the continuity required by *Wiley*, when it is perfectly clear the Company refused to assume any obligations under the agreements.

[4] Subsequently, the Interscience plant was closed and the former Interscience employees were integrated into Wiley's work force. The arbitrator, relying in part on the NLRB's decision in *Burns*, held that the provisions of the Interscience collective-bargaining agreement remained in effect for as long as Wiley continued to operate

The claims which the union sought to compel Wiley to arbitrate were thus the claims of Wiley's employees as to the benefits they were entitled to receive in connection with their employment. It was on this basis that the Court in *Wiley* found that there was the "substantial continuity of identity in the business enterprise," 376 U. S., at 551, which it held necessary before the successor employer could be compelled to arbitrate.

Here, however, Howard Johnson decided to select and hire its own independent work force to commence its operation of the restaurant and motor lodge.[5] It there-

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the former Interscience enterprise as a unit in substantially the same manner as prior to the merger, but that the integration of the former Interscience employees into Wiley's operations destroyed this continuity of identity and terminated the effectiveness of the bargaining agreement. 55 Lab. Arb., at 218–220.

[5] It is important to emphasize that this is not a case where the successor corporation is the "alter ego" of the predecessor, where it is "merely a disguised continuance of the old employer." *Southport Petroleum Co.* v. *NLRB*, 315 U. S. 100, 106 (1942). Such cases involve a mere technical change in the structure or identity of the employing entity, frequently to avoid the effect of the labor laws, without any substantial change in its ownership or management. In these circumstances, the courts have had little difficulty holding that the successor is in reality the same employer and is subject to all the legal and contractual obligations of the predecessor. See *Southport Petroleum Co.* v. *NLRB*, *supra*; *NLRB* v. *Herman Bros. Pet Supply*, 325 F. 2d 68 (CA6 1963); *NLRB* v. *Ozark Hardwood Co.*, 282 F. 2d 1 (CA8 1960); *NLRB* v. *Lewis*, 246 F. 2d 886 (CA9 1957).

There is not the slightest suggestion in this case that the sale of the restaurant and motor lodge by the Grissoms to Howard Johnson was in any sense a paper transaction without meaningful impact on the ownership or operation of the enterprise. Howard Johnson had no ownership interest in the restaurant or motor lodge prior to this transaction. Although the Grissoms' operation of the enterprise as Howard Johnson's franchisee was subject to substantial restraints imposed by the franchise agreements on some aspects of the business, the franchise agreements imposed no restrictions on the

fore hired only nine of the 53 former Grissom employees and none of the Grissom supervisors. The primary purpose of the Union in seeking arbitration here with Howard Johnson is not to protect the rights of Howard Johnson's employees; rather, the Union primarily seeks arbitration on behalf of the former Grissom employees who were *not* hired by Howard Johnson. It is the Union's position that Howard Johnson was bound by the pre-existing collective-bargaining agreement to employ all of these former Grissom employees, except those who could be dismissed in accordance with the "just cause" provision or laid off in accordance with the seniority provision. It is manifest from the Union's efforts to obtain injunctive relief requiring the Company to hire all of these employees that this is the heart of the controversy here. Indeed, at oral argument, the Union conceded that it would be making the same argument here if Howard Johnson had not hired any of the former Grissom employees,[6] and that what was most important

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Grissoms' hiring or labor relations policies. There is nothing in the record to indicate that Howard Johnson had had any previous dealings with the Union, or had participated in any way in negotiating or approving the collective-bargaining agreements.

[6] "Question: . . . You say the man is a successor and therefore there never was a break in his contractual obligations. You've still got to make the case for the successorship.

"Mr. Gold [for the Union]: Well, that's right. I think our first duty is to show that there is a continuity of the business enterprise which makes it proper to say that the second employer is a successor.

"Where there isn't a continuity, then he is not a successor and he is not bound by the arbitration clause or any of the other potential obligations which are in the agreement.

"Question: But in deciding successorship, I take it you put aside the fact that he may not have hired *any* of the old employees?

"Mr. Gold: Yes, Your Honor . . . ." Tr. of Oral Arg. 37–38 (emphasis added).

to the Union was the prospect that the arbitrator might order the Company to hire all of these employees.[7]

What the Union seeks here is completely at odds with the basic principles this Court elaborated in *Burns*. We found there that nothing in the federal labor laws "requires that an employer . . . who purchases the assets of a business be obligated to hire all of the employees of the predecessor though it is possible that such an obligation might be assumed by the employer." 406 U. S., at 280 n. 5. See also *Golden State Bottling Co.* v. *NLRB*, 414 U. S., at 184 n. 6. *Burns* emphasized that "[a] potential employer may be willing to take over a moribund business only if he can make changes in corporate structure, composition of the labor force, . . . and nature of supervision." 406 U. S., at 287–288. We rejected the Board's position in part because "[i]t would seemingly follow that employees of the predecessor would be deemed employees of the successor, dischargeable only in accordance with provisions of the contract and subject to the grievance and arbitration provisions thereof. Burns would not have been free to replace Wackenhut's

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[7] "Question: Well, isn't part of your submission . . . that the arbitrator could decide to put all 41 [employees who had been hired by Howard Johnson] back to work?

"Mr. Gold: Yes, Your Honor.

"Question: Which means that the successor does not have the right not to hire, that he must perhaps take over the old employees?

"Mr. Gold: Yes, Your Honor.

. . . . . .

"Question: . . . [Y]ou still say that he may bring his own employees along.

"Mr. Gold: Well, no, one of the rules is that the just cause and seniority provisions of the agreement apply. That is probably the most important aspect of the bargain from the union and the employees' standpoint. And if——

"Question: You certainly are taking quite a bite out of *Burns*, I suppose, in these cases." Tr. of Oral Arg. 27, 33.

guards with its own except as the contract permitted." *Id.*, at 288. Clearly, *Burns* establishes that Howard Johnson had the right not to hire any of the former Grissom employees, if it so desired.[8] The Union's effort to circumvent this holding by asserting its claims in a § 301 suit to compel arbitration rather than in an unfair labor practice context cannot be permitted.

We do not believe that *Wiley* requires a successor employer to arbitrate in the circumstances of this case.[9]

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[8] See *Crotona Service Corp.*, 200 N. L. R. B. 738 (1972). Of course, it is an unfair labor practice for an employer to discriminate in hiring or retention of employees on the basis of union membership or activity under § 8 (a) (3) of the National Labor Relations Act, 29 U. S. C. § 158 (a) (3). Thus, a new owner could not refuse to hire the employees of his predecessor solely because they were union members or to avoid having to recognize the union. See *NLRB* v. *Burns International Security Services*, 406 U. S. 272, 280–281, n. 5 (1972); *K. B. & J. Young's Super Markets* v. *NLRB*, 377 F. 2d 463 (CA9), cert. denied, 389 U. S. 841 (1967); *Tri State Maintenance Corp.* v. *NLRB*, 132 U. S. App. D. C. 368, 408 F. 2d 171 (1968). There is no suggestion in this case that Howard Johnson in any way discriminated in its hiring against the former Grissom employees because of their union membership, activity, or representation.

[9] The Court of Appeals stated that "[t]he first question we must face is whether Howard Johnson is a successor employer," 482 F. 2d, at 492, and, finding that it was, that the next question was whether a successor is required to arbitrate under the collective-bargaining agreement of its predecessor, *id.*, at 494, which the court found was resolved by *Wiley*. We do not believe that this artificial division between these questions is a helpful or appropriate way to approach these problems. The question whether Howard Johnson is a "successor" is simply not meaningful in the abstract. Howard Johnson is of course a successor employer in the sense that it succeeded to operation of a restaurant and motor lodge formerly operated by the Grissoms. But the real question in each of these "successorship" cases is, on the particular facts, what are the legal obligations of the new employer to the employees of the former owner or their representative? The answer to this inquiry requires analysis of the inter-

The Court there held that arbitration could not be compelled unless there was "substantial continuity of identity in the business enterprise" before and after a change of ownership, for otherwise the duty to arbitrate would be "something imposed from without, not reasonably to be found in the particular bargaining agreement and the acts of the parties involved." 376 U. S., at 551. This continuity of identity in the business enterprise necessarily includes, we think, a substantial continuity in the identity of the work force across the change in ownership. The *Wiley* Court seemingly recognized this, as it found the requisite continuity present there in reliance on the "wholesale transfer" of Interscience employees to Wiley. *Ibid.* This view is reflected in the emphasis most of the lower courts have placed on whether the successor employer hires a majority of the predecessor's employees in determining the legal obligations of the suc-

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ests of the new employer and the employees and of the policies of the labor laws in light of the facts of each case and the particular legal obligation which is at issue, whether it be the duty to recognize and bargain with the union, the duty to remedy unfair labor practices, the duty to arbitrate, etc. There is, and can be, no single definition of "successor" which is applicable in every legal context. A new employer, in other words, may be a successor for some purposes and not for others. See *Golden State Bottling Co.* v. *NLRB*, 414 U. S. 168, 181 (1973); *International Assn. of Machinists* v. *NLRB*, 134 U. S. App. D. C. 239, 244, 414 F. 2d 1135, 1140 (1969) (Leventhal, J., concurring); Goldberg, The Labor Law Obligations of a Successor Employer, 63 Nw. U. L. Rev. 735 (1969); Comment, Contractual Successorship: The Impact of *Burns*, 40 U. Chi. L. Rev. 617, 619 n. 10 (1973).

Thus, our holding today is that Howard Johnson was not required to arbitrate with the Union representing the former Grissom employees in the circumstances of this case. We necessarily do not decide whether Howard Johnson is or is not a "successor employer" for any other purpose.

cessor in § 301 suits under *Wiley*.[10] This interpretation of *Wiley* is consistent also with the Court's concern with affording protection to those employees who are in fact retained in "[t]he transition from one corporate organization to another" from sudden changes in the terms and conditions of their employment, and with its belief that industrial strife would be avoided if these employees' claims were resolved by arbitration rather than by " 'the relative strength . . . of the contending forces.' " *Id.*, at 549, quoting *United Steelworkers* v. *Warrior & Gulf Navigation Co.*, 363 U. S. 574, 580 (1960). At the same time, it recognizes that the employees of the terminating employer have no legal right to continued employment with the new employer, and avoids the difficulties inherent in the Union's position in this case. This holding is compelled, in our view, if the protection afforded employee interests in a change of ownership by *Wiley* is to be reconciled with the new employer's right to operate the enterprise with his own independent labor force.

Since there was plainly no substantial continuity of identity in the work force hired by Howard Johnson with that of the Grissoms, and no express or implied assumption of the agreement to arbitrate, the courts below erred in compelling the Company to arbitrate the extent of its

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[10] See *Printing Specialties Union* v. *Pride Papers Aaronson Bros. Paper Corp.*, 445 F. 2d 361, 363–364 (CA2 1971); *Wackenhut Corp.* v. *Plant Guard Workers*, 332 F. 2d 954, 958 (CA9 1964); *International Assn. of Machinists* v. *NLRB*, 134 U. S. App. D. C., at 244 n. 4, 414 F. 2d, at 1140 n. 4 (Leventhal, J., concurring); *Boeing Co.* v. *International Assn. of Machinists*, 351 F. Supp. 813 (MD Fla. 1972); *Owens-Illinois, Inc.* v. *District 65, Retail, Wholesale, & Department Store Union*, 276 F. Supp. 740 (SDNY 1967); *Local Joint Executive Board, Hotel & Restaurant Employees* v. *Joden, Inc.*, 262 F. Supp. 390 (Mass. 1966). See also Comment, *supra*, n. 9, at 621.

obligations to the former Grissom employees. Accordingly, the judgment of the Court of Appeals must be

Reversed.

MR. JUSTICE DOUGLAS, dissenting.

The petitioner, Howard Johnson, in 1959 and 1960 entered into franchise agreements with P. L. Grissom, P. L. Grissom & Son, Charles T. Grissom, Ben Bibb, and the Belleville Restaurant Company (hereinafter collectively the Grissoms) under which the franchise operated a Howard Johnson Restaurant and Motor Lodge. In 1968 the Grissoms entered into collective-bargaining agreements with the respondent Union affecting both their restaurant and motel employees. On June 16, 1972, the Grissoms sold the business to Howard Johnson, the transfer of management to take place on July 24, 1972. On June 28, Howard Johnson notified the Grissoms that it would not recognize or assume their labor agreements and on July 9, 1972, the Grissoms gave notice to their employees that they would be terminated at midnight, July 23. Howard Johnson began interviewing prospective employees in early July, and when it took over the operation on July 24 it retained only nine of the Grissoms' employees; at least 40 were permanently replaced. The Union brought this action under § 301 of the Labor Management Relations Act, and the District Court issued an order compelling petitioner to arbitrate. The Court of Appeals affirmed, but today this Court reverses, holding that Howard Johnson was not a successor employer. I believe that the principles of successorship laid down in *John Wiley & Sons* v. *Livingston,* 376 U. S. 543, and *NLRB* v. *Burns International Security Services,* 406 U. S. 272, require affirmance, and thus I dissent.

Wiley was also a § 301 suit, to compel arbitration. There the company had merged with Interscience,

another and smaller publisher, 40 of whose employees were represented by the union. The union contended that the merger did not affect its right to represent these employees in negotiations with Wiley, and that Wiley was bound to recognize certain rights of these employees which had been guaranteed in the collective-bargaining agreement signed by Interscience. Wiley contended that the merger terminated the collective-bargaining agreement for all purposes and refused to bargain with the union. We held that the union could compel arbitration of this dispute under the arbitration provision of the collective-bargaining agreement even though Wiley had never signed the agreement. We pointed out that the duty to arbitrate will not in every case survive a change of ownership, as when "the lack of any substantial continuity of identity in the business enterprise before and after a change would make a duty to arbitrate something imposed from without, not reasonably to be found in the particular bargaining agreement and the acts of the parties involved." *Wiley, supra,* at 551. But that was not the case in *Wiley:* "[T]he impressive policy considerations favoring arbitration are not wholly overborne by the fact that Wiley did not sign the contract being construed. This case cannot readily be assimilated to the category of those in which there is no contract whatever, or none which is reasonably related to the party sought to be obligated." *Id.,* at 550.

It must follow *a fortiori* that it is also not the case here. The contract between the Grissoms and the Union explicitly provided that successors of the Grissoms would be bound,[1] and certainly there can be no question that

[1] "This Agreement shall be binding upon the successors, assigns, purchasers, lessees or transferees of the Employer whether such succession, assignment or transfer be effected voluntarily or by operation of law or by merger or consolidation with another com-

there was a substantial continuity—indeed identity—of the business operation under Howard Johnson, the successor employer. Under its franchise agreement Howard Johnson had substantial control over the Grissoms' operation of the business; [2] it was no stranger to the enterprise it took over. The business continued without interruption at the same location, offering the same products and services to the same public, under the same name and in the same manner, with almost the same number of employees. The only change was Howard Johnson's replacement of the Union members with new personnel, but as the court below pointed out, petitioner's reliance upon that fact is sheer "bootstrap": "[Howard Johnson] argues that it need not arbitrate the refusal to hire Grissoms' employees because it is not a successor. It is not a successor, because it did not hire a majority of Grissoms' employees." 482 F. 2d 489, 493.

As we said in *Wiley*, "[i]t would derogate from 'the federal policy of settling labor disputes by arbitration,' . . . if a change in the corporate structure or ownership of a business enterprise had the automatic consequence of removing a duty to arbitrate previously established . . . ." 376 U. S., at 549.

NLRB v. *Burns International Security Services, supra,* does not require any different result. There the

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pany provided the establishment remains in the same line of business." 482 F. 2d 489, 491.

[2] The motel franchise agreement provided, for example, that Howard Johnson would determine and approve standards of construction, operation, and service, and would have the right at any time to enter the premises for that purpose; that prior approval would be required for equipment and supplies bearing the name "Howard Johnson"; that Howard Johnson would have the first option to purchase if the business were to be sold, and that in any event Howard Johnson must approve any successor. See the District Court opinion, 81 L. R. R. M. 2329, 2330, and App. 50a *et seq.*

original employer, Wackenhut, had a contract with Lockheed to provide security services, and at the expiration of that contract Lockheed took bids on providing the service and hired Burns to replace Wackenhut. Wackenhut employees had been represented by the union, but Burns, which hired 27 of the 42 Wackenhut guards, refused to bargain with the union or honor the collective-bargaining agreement signed by Wackenhut. We affirmed the NLRB's order requiring Burns to bargain with the union, but concluded that Burns was not bound by the substantive provisions of the collective-bargaining agreement between the union and Wackenhut. In distinguishing *Wiley,* we pointed out in *Burns* that unlike *Wiley* it did not involve a § 301 suit to compel arbitration, and thus was without the support of the national policy favoring arbitration. *Burns, supra,* at 286. Moreover, in *Burns* "there was no merger or sale of assets, and there were no dealings whatsoever between Wackenhut and Burns. On the contrary, they were competitors for the same work, each bidding for the service contract at Lockheed. Burns purchased nothing from Wackenhut and became liable for none of its financial obligations." *Ibid.*

All of the factors distinguishing *Burns* and *Wiley* call here for affirmance of the order to arbitrate. This is a § 301 suit, and Howard Johnson did purchase the assets from the Grissoms. As a matter of federal labor law, when Howard Johnson took over the operation that had been conducted by its franchisee, it seems clear that it also took over the duty to arbitrate under the collective-bargaining agreements which expressly bound the Grissoms' successors. Any other result makes nonsense of the principles laid down in *Wiley.* The majority, by making the number of prior employees retained by the successor the sole determinative factor, accepts petition-

er's bootstrap argument. The effect is to allow any new employer to determine for himself whether he will be bound, by the simple expedient of arranging for the termination of all of the prior employer's personnel. I cannot accept such a rule, especially when, as here, all of the other factors point so compellingly to the conclusion that petitioner is a successor employer who should be bound by the arbitration agreement.

VERMONT *v.* NEW YORK ET AL.

ON BILL OF COMPLAINT

No. 50, Orig. Decided June 3, 1974

On a bill of complaint by Vermont charging New York and a paper company with polluting Lake Champlain, impeding navigation, and creating a public nuisance, this Court will not approve a consent decree proposed by the Special Master to be entered without further argument or hearing and calling for the appointment of another Special Master to police its execution and propose to the Court resolution of any future issues, since there have been no findings of fact or rulings either as to equitable apportionment of the water involved or as to whether New York and the paper company are responsible for a public nuisance, and since the proposed new Special Master's procedure would materially change the Court's function in interstate contests so that in supervising execution of the decree it would be acting more in an arbitral than a judicial manner and might be considering proposals having no relation to law or to the Court's Art. III function.

PER CURIAM.

On April 24, 1972, after oral argument, we granted Vermont's motion to file a bill of complaint against New York and the International Paper Co. which alleged that as a result of discharge of wastes, largely from International's mills, that company and New York are responsible for a sludge bed in Lake Champlain and Ticonderoga Creek that has polluted the water, impeded navigation, and constituted a public nuisance. 406 U. S. 186. Issue was joined and the Honorable R. Ammi Cutter was appointed Special Master. 408 U. S. 917. Later the United States sought leave to intervene, stating it had numerous interests in these waters under federal statutes. We referred the motion to the Special Master, 409 U. S. 1103, who granted intervention. During the year 1973, 75 days of testimony were received, Vermont presenting

substantially all of its direct case. New York has put in about half of its direct case. Neither International nor the United States up to now has offered any evidence.

The Report of the Special Master dated April 24, 1974, states that he suggested that the parties might adjust their differences less expensively than by litigation. He reports that the United States succeeded in bringing about serious negotiations which resulted in a settlement that the Special Master commends to the Court for approval. The proposed settlement is represented by a Proposed Consent Decree and a stipulation that the Decree may be entered by the Court without further argument or hearing.

The settlement "contemplates that no findings shall be made" and it provides that "it shall not constitute an adjudication on any issue of fact or law, or evidence, or any admission by any party with respect to any such issue." The Special Master reports, "In my opinion, no settlement would be possible if this report were to contain any findings." He adds that in his opinion "it reaches a reasonable result, consistent with the public interest, and acceptable on the basis of the evidence thus far presented."

By Art. I of the Decree a special South Lake Master [1] is to be appointed with all the usual powers of Special Masters named by us. He is to resolve matters of controversy between the parties after they have exhausted all administrative and other remedies (except judicial review). When he has decided the matter, he will file his recommendation with the Clerk of the Court. Unless any party "aggrieved" files exceptions with the Court within 30 days, it becomes a decision of the Court "unless

[1] South Lake Champlain "means that portion of Lake Champlain extending from Whitehall, New York, to the Lake Champlain Bridge near Crown Point, New York." Proposed Decree, Art. II (I).

disapproved by the Court." Proposed Decree, Schedule 1, § 1.6. But nothing in Schedule 1 limits any regulatory or law enforcement authority "with lawful jurisdiction independently to carry out or enforce applicable law and regulations."

After nine years from our approval of the Decree, the South Lake Master on application for modification of it may submit his recommendations to the Court without prior exhaustion of administrative remedies before the federal and New York authorities or after such exhaustion, as he chooses.

The South Lake Master may order International to permit inspection of Old Mill [2] or New Mill [3] on showing of good cause. Schedule 1, § 1.7.

Schedule 2 of the Proposed Decree provides for grading and covering the bark pile near Old Mill and for lowering the water level in an adjacent pond to reduce the drainage of the bark pile into Ticonderoga or tributaries.

Schedule 3 prescribes methods of control of malodorous air emissions from New Mill; and Schedule 1, § 1.5 (b), provides that notwithstanding the provisions of Schedule 3, if, after November 1, 1975, objectionable odors attributable to New Mill are detected in Vermont "during a significant period of time," the South Lake Master may recommend "other or further action or relief."

Within 30 days after approval of the Proposed Decree, International shall submit an emergency report "for a conceptual plan" to modify the air emission controls specified in Schedule 3 and, if approved by New York, the new equipment and materials for the facilities shall be completed and in operation no later than November 1, 1975. Schedule 3, § 3.2 (c)(7).

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[2] Old Mill is located in the village of Ticonderoga and was long operated as a pulp and paper mill.

[3] New Mill is located four miles north of that village.

Schedule 3, § 3.3, states the volume of Total Reduced Sulfur (TRS) from International's "recovery boiler" once the Proposed Decree is approved. Section 3.4 (a) states the standard for emissions of TRS from the lime kiln and § 3.4 (b), the amount of sodium hydroxide in the scrubbing solution in the lime kiln scrubber.

Schedule 4 covers the water discharge from New Mill. It specifies in § 4.1 (a) that the amount of BOD_5[4] in the waste water will not exceed 4400 pounds per day as a monthly average. Section 4.1 (b) specifies the maximum total phosphorus in the process waste-water effluent. Section 4.2 provides that the effluent will be considered toxic, if over a 96-hour period, 20% of the test fish (yellow perch) fail to survive in a solution composed of 65% process waste-water effluent and 35% Lake Champlain water.

Sections 4.3 and 4.4 provide clinical and other water tests for International to make at stated intervals.

Appendix A "delivered pursuant to the command of the Supreme Court of the United States" is a release of International by Vermont of all damages past, present, and future caused (1) by the accumulation of sediment in Ticonderoga Creek and the Ticonderoga Bay area of the lake; (2) by the discharge of waters from Old Mill prior to the date of entry of the decree; (3) by air emissions from Old Mill prior to such date; and (4) by air emissions from New Mill prior to that date.

Appendix B states the position of the United States that it is not in the public interest to remove the sludge deposits and that dredging them is not justified.

Appendix C is a release of International by the United States from all liability for the accumulation of sediment

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[4] This is the five-day biochemical oxygen demand of the process waste-water effluent as measured by a specified method.

in Ticonderoga Creek and the Ticonderoga Bay area because of past waste discharges, save for costs arising out of remedial action taken as a consequence of "the needs of anchorage or navigation."

The Special Master has done a very difficult task well and with distinction; we are indeed grateful for the professional services he has rendered. But we have concluded not to approve the Proposed Decree or appoint a South Lake Master.

I

In *Wisconsin* v. *Illinois*, 281 U.S. 696, the Court on the report of a Special Master enjoined the Sanitary District of Chicago from withdrawing through the Chicago drainage canal more than a stated number of cubic feet of water per second. That was on April 21, 1930. On May 22, 1933, on application of the States for a "commissioner or special officer" to execute the decree, the Court ordered Illinois to take certain steps respecting the diversion, but it denied the request to appoint the commissioner. 289 U. S. 710, 711.

Wyoming v. *Colorado*, 259 U. S. 419, 260 U. S. 1, involved an allocation of the waters of the Laramie River. The parties were once more before the Court in 1936, 298 U. S. 573. This time the Court entered an injunction against continuing diversions contrary to the prior decrees, *id.*, at 582–583. The Court refused to order measuring devices at places of diversion or to *appoint a water master to keep the records*, the Court saying, "While the problem of measuring and recording the diversions is a difficult one, we entertain the hope that the two States will by cooperative efforts accomplish a satisfactory solution of it." *Id.*, at 586. In time the two States, policing themselves, resolved the controversy, 309 U. S. 572.

We noted in *Nebraska* v. *Wyoming*, 325 U. S. 589, 616,

that continuing Court supervision over decrees of equitable apportionment of waters was undesirable.

New Jersey v. *New York*, 283 U. S. 805, is not an exception. It involved a dispute between New Jersey, New York, New York City, and Pennsylvania over the waters of the Delaware River. The decree was an equitable apportionment of the water coupled with protective provisions, *first*, for a sewage disposal plant at Port Jervis, New York, that met prescribed cleansing standards; *second*, the banning of the discharge of untreated industrial wastes into the Delaware and Neversink Rivers; and *third*, the treatment of industrial wastes practically to free them "from suspended matter and [to render them] nonputrescent." *Ibid.* That decree, entered May 25, 1931, was modified June 7, 1954, 347 U. S. 995, when a Special Master's Report was approved. The prior equitable apportionment was altered, and new and somewhat different formulae to measure and control the diversions were provided. A River Master was to be selected by the Chief Hydraulic Engineer of the U. S. Geological Survey to administer the decree. *Id.*, at 1002. He was authorized to measure the actual diversions, *ibid.*, compile data, collect and correlate stream-flow gauging, make periodic reports, and make designated changes in the volume of daily releases, *id.*, at 1003.

But it is a rare case where we have appointed a Water Master. The one appointed in *New Jersey* v. *New York* was given only ministerial acts to perform, such as reading gauges and measuring the flow. In that case (1) the rights of the parties to the water had been determined by the Court and (2) the sewage and industrial waste problems had been adjudicated and resolved.[5] All that

[5] Pollution of interstate waters raises questions in the area of the law of public nuisance as we recently noted in *Illinois* v. *City of Milwaukee*, 406 U. S. 91, 106–107.

remained was to supervise the application of the various formulae which the Court had decreed, based on findings of fact.

Wisconsin v. *Illinois*, 281 U. S. 179, involved the use of Lake Michigan waters by a sanitary district in Illinois to operate sewage treatment plants. The Court had ordered Illinois to restrict its use of Lake Michigan waters and to build certain facilities to allow treatment without the use of a great deal of lake waters. Illinois was given certain timetables for completion of the new facilities. The Special Master recommended either the appointment of a commission to supervise the construction or the filing of progress reports by the sanitary commission with the Clerk of this Court. The Court chose the option of not appointing a commission, and instead ordered the district to file semi-annual compliance reports with the Court. Masters were appointed at several points in this litigation for specific short-term purposes, but no quasi-permanent master to oversee general compliance was appointed. After the district was ordered to construct the facilities, Illinois impeded progress by withholding necessary state funds. The parties asked for a master to police compliance with the decree. The Court appointed a Master to investigate but he was relieved after the receipt of his report. Illinois was ordered to supply the necessary funds and to report its compliance with the Clerk of the Court. 289 U. S. 395, 411–412.

In the instant case no findings of fact have been made; nor has any ruling been resolved concerning either equitable apportionment of the water involved or the questions relative to whether New York and International are responsible for the creation of a public nuisance as alleged by Vermont.[6]

[6] Vermont also alleges that the deposit of sludge has caused a shift of the channel (the border between the two States) in New

The proposed South Lake Master would police the execution of the settlement set forth in the Decree and pass on to this Court his proposed resolution of contested issues that the future might bring forth. Such a procedue would materially change the function of the Court in these interstate contests. Insofar as we would be supervising the execution of the Consent Decree, we would be acting more in an arbitral rather than a judicial manner. Our original jurisdiction heretofore has been deemed to extend to adjudications of controversies between States according to principles of law, some drawn from the international field, some expressing a "common law" formulated over the decades by this Court.

The proposals submitted by the South Lake Master to this Court might be proposals having no relation to law. Like the present Decree they might be mere settlements by the parties acting under compulsions and motives that have no relation to performance of our Art. III functions. Article III speaks of the "judicial power" of this Court, which embraces application of principles of law or equity to facts, distilled by hearings or by stipulations. Nothing in the Proposed Decree nor in the mandate to be given the South Lake Master speaks in terms of "judicial power."

II

The parties have available other and perhaps more appropriate means of reaching the results desired under the Proposed Court Decree. An interstate compact under Art. I, § 10, cl. 3, is a possible solution of the conflict here. Vermont and New York (along with Connecticut, Maine,

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York's favor. Disputes over interstate boundaries are properly cognizable here. *Michigan* v. *Wisconsin*, 270 U. S. 295; *Massachusetts* v. *New York*, 271 U. S. 65.

Massachusetts, New Hampshire, and Rhode Island) are already parties to the New England Interstate Water Pollution Control Compact, 61 Stat. 682 (1947).

A settlement of this interstate dispute by agreement of the parties is another alternative. Once a consensus is reached there is no reason, absent a conflict with an interstate compact, why such a settlement would not be binding. And such a settlement might be the basis for a motion to dismiss the complaint. Cf. *Missouri* v. *Nebraska*, *post*, p. 904.

So ordered.

GERSTEIN ET AL. *v.* COE ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF FLORIDA

No. 73–1157. Decided June 3, 1974

State's appeal under 28 U. S. C. § 1253 from a declaratory judgment of a three-judge District Court invalidating a state statute dismissed for want of jurisdiction, since § 1253 does not authorize appeal to this Court from the grant or denial of declaratory relief alone.

Dismissed for want of jurisdiction; certiorari before judgment to Court of Appeals denied.

PER CURIAM.

A three-judge District Court entered a declaratory judgment holding unconstitutional a Florida statute, Fla. Stat. Ann. § 458.22 (3) (Supp. 1974–1975), which forbids an abortion without the consent of the husband, if the woman is married, and if unmarried and under the age of 18, without the consent of a parent. Because it was anticipated that the State would respect the declaratory judgment, the court declined to issue an injunction against the enforcement of the statute. The State of Florida appeals from the declaratory judgment invalidating the statute. The appeal is dismissed for want of jurisdiction. Title 28 U. S. C. § 1253, under which this appeal is sought to be taken, does not authorize an appeal from the grant or denial of declaratory relief alone. *Gunn* v. *University Committee*, 399 U. S. 383 (1970); *Mitchell* v. *Donovan*, 398 U. S. 427 (1970); *Rockefeller* v. *Catholic Medical Center of Brooklyn & Queens, Inc., Division of St. Mary's Hospital*, 397 U. S. 820 (1970); see also *Roe* v. *Wade*, 410 U. S. 113, 123 (1973). The declaratory judgment is appealable to the Court of Appeals, and we are informed that an

appeal to that court has already been taken. It is suggested that we treat the statement of jurisdiction as a petition for certiorari before judgment to the Court of Appeals pursuant to 28 U. S. C. § 1254 (1). The petition for certiorari is denied.

POE ET AL. *v.* GERSTEIN ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF FLORIDA

No. 73–1283. Decided June 3, 1974

A three-judge District Court, which entered a declaratory judgment holding a state abortion statute unconstitutional, properly refused to issue an injunction against enforcement of the statute, where there was no allegation or proof that the State would not acquiesce in the declaratory judgment.

Affirmed.

PER CURIAM.

A three-judge District Court entered a declaratory judgment holding unconstitutional a Florida statute, Fla. Stat. Ann. § 458.22 (3) (Supp. 1974–1975), which forbids an abortion without the consent of the husband, if the woman is married, and if unmarried and under the age of 18, without the consent of a parent. Because it was anticipated that the State would respect the declaratory judgment, the court declined to issue an injunction against the enforcement of the statute. The plaintiffs in the District Court are appellants here and challenge the refusal to issue the injunction. The judgment of the District Court is affirmed in this respect. Whether or not the declaratory judgment was itself properly issued, a question on which we intimate no opinion, the District Court properly refused to issue the injunction; for there was "no allegation here and no proof that respondents would not, nor can we assume that they will not, acquiesce in the decision . . . holding the challenged ordinance unconstitutional." *Douglas* v. *City of Jeannette*, 319 U. S. 157, 165 (1943). This aspect of *Douglas* v. *City of Jeannette* has been repeatedly recognized in later cases. *Dombrowski*

v. *Pfister*, 380 U. S. 479, 484–485 (1965); *Zwickler* v. *Koota*, 389 U. S. 241, 253–254 (1967); *Roe* v. *Wade*, 410 U. S. 113, 166–167 (1973). It is unnecessary to deal separately with the question whether the District Court was correct in denying intervention in the District Court to other parties who are appellants here; for assuming they are to be considered proper parties in the District Court and in this Court, we would affirm the denial of the injunction as to them for the same reasons we affirm the denial of such relief to appellants who were plaintiffs below.

So ordered.

MOBIL OIL CORP. *v.* FEDERAL POWER COMMISSION ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 73–437. Argued April 17, 1974—Decided June 10, 1974*

The Federal Power Commission (FPC) instituted a proceeding in 1961 to establish an area rate structure for interstate sales of natural gas produced in the Southern Louisiana area. After extensive hearings the FPC in 1968 issued an order establishing ceiling rates for gas sold by producers in the area and ordering refunds of rates in excess of the maximum that had been collected prior to the order. The Court of Appeals upheld the order, but declared that the affirmance was not to be interpreted to foreclose the FPC from making such changes in its order, as to both past and future rates, as it found to be in the public interest. In response to petitions for rehearing urging that the FPC's authority to modify its order, after affirmance by the court, could be exercised only prospectively, the Court of Appeals stated that "[w]e wish to make crystal clear the authority of the Commission in this case to reopen *any* part of its order that circumstances require be opened," that "[t]he Commission can make retrospective as well as prospective adjustments in this case if it finds that it is in the public interest to do so," and that if "the refunds are too burdensome in light of new evidence to be in the public interest . . . the Commission shall have the power and the duty to remedy the situation by changing its orders." The FPC thereupon reopened the 1961 proceeding, and after considering a settlement proposal that had been agreed to by a large majority of the parties, issued an order in 1971 establishing a new rate structure for the Southern Louisiana area superseding the 1968 order. This 1971 order established, *inter alia*, (1) higher ceiling rates for both "flowing" or "first vintage" gas (gas delivered after the order's effective date under contracts dated prior to

*Together with No. 73–457, *Public Service Commission of New York* v. *Federal Power Commission et al.*, and No. 73–464, *Municipal Distributors Group* v. *Federal Power Commission et al.*, also on certiorari to the same court.

October 1, 1968), and "new" or "second vintage" gas (gas delivered after the order's effective date under contracts dated after October 1, 1968); (2) two incentive programs, one providing for refund workoff credits based on a refund obligor's commitment of additional gas reserves to the interstate market (the producer being required to offer at least 50% of the new reserves to the purchaser to whom the refund would otherwise be payable), and the other providing for contingent escalation of rates based on new dedications of gas to the market; (3) minimum rates to be paid by producers to pipelines for transportation of liquids and liquefiable hydrocarbons; and (4) a moratorium upon the filing of rate increases for flowing gas until October 1, 1976, and for new gas until October 1, 1977. The Court of Appeals upheld this order as an appropriate exercise of administrative discretion supported by substantial evidence on the authority of *Permian Basin Area Rate Cases*, 390 U. S. 747. *Held:*

1. The FPC had the statutory authority to adopt the 1971 order, notwithstanding the Court of Appeals' affirmance of the 1968 order. Pp. 310–315.

(a) Under circumstances where the Court of Appeals' affirmance of the 1968 order was not "unqualified" or final, and such order had not been made effective but was stayed until withdrawn in the 1971 order, the Court of Appeals' action in authorizing the FPC to reopen the 1968 order did not exceed the court's powers under § 19 (b) of the Natural Gas Act "to affirm, modify, or set aside [an] order in whole or in part," or constitute an improper exercise of the court's equity powers with which it is vested in reviewing FPC orders. Pp. 310–312.

(b) The fact that the settlement proposal lacked unanimous agreement of the parties did not preclude the FPC from adopting the proposal as an order establishing just and reasonable rates, since the FPC clearly had the power to admit the agreement into the record, and indeed was obliged to consider it. Pp. 312–314.

(c) The fact that the Court of Appeals' opinion on rehearing regarding the 1968 order authorized modification of the 1968 refund provisions if the refunds "are too burdensome in light of new evidence to be in the public interest," did not require the FPC, before revising the refund terms, to find, based on substantial new evidence, that the refunds "would substantially and adversely affect the producers' ability to meet the continuing gas needs of the interstate market," since the opinion on rehearing was explicit

that the FPC was to have "great flexibility" and could make retrospective as well as prospective adjustments; moreover, the Court of Appeals flatly rejected "the notion that the label 'affirmance' could possibly impair FPC's ability to alter or modify *any* of the provisions, particularly the refund provisions" of the 1968 order. Pp. 314–315.

2. Petitioners' challenges to the established price levels under the 1971 order are without merit. Pp. 315–321.

(a) Mobil's attack on the FPC's evidence of costs is clearly frivolous, since the FPC took extensive evidence of costs in its 1968 order hearings for flowing gas and in both its 1968 and 1971 hearings for new gas, and since the fragments of the record cited by Mobil do not sustain its heavy burden of showing that the FPC's choice was outside what the Court of Appeals could have found to be within the FPC's authority. P. 316.

(b) With respect to Mobil's argument that inclusion of refund workoff credits and contingent escalations in the just and reasonable rates indicates that producers unable to gain part or all of their share of such payments will receive merely their "bare-bones" costs, which constitute illegally low prices, the Court of Appeals did not err in deciding that it was within the FPC's discretion and expertise to conclude that the refund workoff credits and contingent escalations could provide an opportunity for increased prices that would help in generating capital funds and in meeting rising costs, while assuring that such increases will not be levied upon consumers unless accompanied by increased supplies of gas. Pp. 316–319.

(c) New York's contention that the 1971 order rates for flowing gas are excessive is predicated on an erroneously limited view of the permissible range of the FPC's authority. Where the FPC's justification for increasing the price of flowing gas was the necessity for increased revenues to expand future production, rather than new evidence of differing production conditions, the Court of Appeals, against the background of a serious and growing domestic gas shortage, could properly conclude that the FPC might reasonably decide that, as compared with adjustments in rate ceilings to induce more exploration and production, its responsibility to maintain adequate supplies at the lowest reasonable rate could better be discharged by means of contingent escalation and refund credits. Pp. 319–321.

3. The claims of all three petitioners, with respect to both the contingent escalations on flowing gas and the refund credits, that

even if the 1971 rates are sufficient to satisfy the Natural Gas Act's minimum requirements as to amount and, on the basis of the FPC's chosen methodology, are supported by substantial evidence, they are nevertheless unduly discriminatory and therefore unlawful under §§ 4 and 5 of the Act, are also without merit. Pp. 321–327.

(a) Concerning Mobil's argument that undue discrimination results because producers who had not settled their refund obligations will receive advantages from the contingent escalations and refund credits that producers like Mobil, which did settle its obligations, will not receive, it cannot be said that the Court of Appeals misapprehended or grossly misapplied the substantial-evidence standard in concluding that the FPC's assessment of the need for refund credits, compared to the costs and benefits of some other scheme, was adequately supported. Pp. 321–325.

(b) Though New York and MDG argue that the refund credit formula discriminates against pipeline purchasers because it permits producers to work off refunds by offering 50%, rather than 100%, of the new reserves to pipeline purchasers other than those owed the refunds, the Court of Appeals did not err in holding that the refund credit provision, the purpose of which was to increase the supply of gas, was within the FPC's discretion, since the FPC could reasonably conclude that the producers' incentive to explore for and produce new gas in the area, could result in their dedication of new reserves that would exceed in benefit the amount of the refunds. P. 325.

(c) With respect to New York's argument that some producers might abandon their normal business of exploring for and developing new reserves and yet enjoy the increase in their prices for flowing gas if other producers contribute substantial additional reserves, the FPC's belief that producers already operating in the area will continue to do so is at least an equally tenable judgment, and New York offered nothing to overcome the presumption of validity attaching to the exercise of the FPC's expertise. Pp. 326–327.

4. The Court of Appeals' conclusion, contrary to Mobil's contention, that the FPC's fixing of moratoria on new rate filings was supported by required findings of fact and by substantial evidence, did not misapprehend or grossly misapply the substantial-evidence standard. Pp. 327–328.

5. Mobil's argument that the FPC improperly failed to provide automatic adjustments in area rates to compensate for anticipated

higher royalty costs, is hypothetical at this stage and in any event an affected producer is entitled to seek individualized relief. P. 328.

6. The Court of Appeals did not err in concluding that the FPC "acted within the bounds of administrative propriety in abandoning" as a pragmatic adjustment the distinction in maximum permissible rates between casinghead gas and gas-well gas so far as new dedications are concerned, even though casinghead gas was formerly treated as a byproduct of oil and therefore costed and priced lower than gas-well gas. Pp. 328–330.

7. In arguing that the minimum rates provided by the 1971 order to be paid by producers to pipelines for transportation of liquids and liquefiable hydrocarbons are not supported by substantial evidence, Mobil has not met its burden of demonstrating that the Court of Appeals misapprehended or grossly misapplied the substantial-evidence standard. P. 330.

483 F. 2d 880, affirmed.

BRENNAN, J., delivered the opinion of the Court, in which all Members joined except STEWART and POWELL, JJ., who took no part in the consideration or decision of the cases.

Carroll L. Gilliam argued the cause for petitioner in No. 73–437. With him on the briefs were *Tom P. Hamill, Robert D. Haworth,* and *Philip R. Ehrenkranz. George E. Morrow* argued the cause for petitioners in Nos. 73–457 and 73–464. With him on the briefs for petitioner in No. 73–464 were *Ruben Goldberg* and *Charles F. Wheatley, Jr. Michael H. Rosenbloom* filed briefs for petitioner in No. 73–457.

Leo E. Forquer argued the cause for respondent Federal Power Commission in all cases. With him on the brief were *Solicitor General Bork, Mark L. Evans,* and *George W. McHenry, Jr. John R. Rebman* argued the cause for producer respondents in all cases. With him on the brief for respondents Exxon Corp. et al. were *Martin N. Erck, David G. Stevenson, Richard F. Generelly, Edward J. Kremer, Charles E. McGee, Cecil N. Cook, Thomas H.*

Burton, W. J. Stark, Warren M. Sparks, B. James McGraw, Robert W. Henderson, William A. Sackmann, John L. Williford, Paul W. Hicks, Oliver L. Stone, Ronald J. Jacobs, Richard F. Remmers, Stanley M. Morley, Louis Flax, H. W. Varner, Pat Timmons, Scott P. Anger, Kirk W. Weinert, C. Fielding Early, Jr., and *George C. Bond. Raymond N. Shibley* filed a brief for respondent Pipeline Purchaser Group in all cases. *Francis R. Kirkham, James B. Atkin, Woollen H. Walshe, Justin R. Wolf,* and *David B. Ward* filed a brief for respondent The California Company, a Division of Chevron Oil Co., in all cases. *John E. Holtzinger, Jr.,* and *Frederick Moring* filed a brief for respondent Associated Gas Distributors in all cases. *C. William Cooper, Tilford A. Jones, Edward H. Gerstenfield, Robert Corp, Norman A. Flaningam, Lauman Martin, Richard M. Merriman, Elmer Nafziger, Jon D. Noland, James O'Malley, Jr., Richard A. Rosan, William W. Ross, Thomas C. Matthews, Arthur R. Seder, Jr., Charles V. Shannon, Justin A. Stanley,* and *J. Stanley Stroud* filed a brief for respondents United Distribution Companies in all cases.

MR. JUSTICE BRENNAN delivered the opinion of the Court.

We review here the affirmance by the Court of Appeals for the Fifth Circuit of a 1971 order of the Federal Power Commission [1] that established an area rate structure for interstate sales [2] of natural gas produced in the Southern

[1] Opinion No. 598, 46 F. P. C. 86 (1971), together with the Commission's order correcting certain errors and denying rehearing as to all other issues, Opinion No. 598–A, 46 F. P. C. 633 (1971).

[2] As in *Permian Basin Area Rate Cases,* 390 U. S. 747, 754 n. 2 (1968), sales within the Commission's jurisdiction will, for convenience, be termed "jurisdictional" or "interstate" sales. See n. 17, *infra.*

Louisiana area. The Southern Louisiana area is one of seven geographical areas defined by the Commission for the purpose of prescribing areawide price ceilings.[3] This

[3] The Court of Appeals reported the status of area rate proceedings in 483 F. 2d 880, 886 n. 3. The Commission has updated that information as follows:

"1. *Permian Basin Area*

"Opinion Nos. 468 and 468–A, 34 FPC 159, and 1068, respectively (1965), affirmed *Permian Basin Area Rate Cases*, 390 U. S. 747 (1968)

"New rates for this area were established in:

"Opinion Nos. 662 and 662–A (*Area Rate Proceeding, Permian Basin Area*), — FPC —, —, (Docket No. AR70–1 (Phase I), issued August 7, 1973, and September 28, 1973, respectively); pending review *sub nom. Chevron Oil Co., Western Division, et al.* v. *F. P. C.* (9th Cir. Nos. 73–2861, *et al.*, filed September 28, 1973)

"2. *Southern Louisiana Area*

"Opinion Nos. 546 and 546–A, 40 FPC 530, 41 FPC 301, respectively (1968), affirmed *sub nom. Austral Oil Co., et al.* v. *F. P. C.*, 428 F. 2d 407 (5th Cir. 1970), on rehearing, 444 F. 2d 125 (1970); certiorari denied *sub nom. Municipal Distributors Group* v. *F. P. C.*, 400 U. S. 950 (1970)

"New rates for this area were established in:

"Opinion Nos. 598 and 598–A, 46 FPC 86 and 633, respectively (1971), affirmed *sub nom. Placid Oil Co., et al.* v. *F. P. C.*, 483 F. 2d 880 (1973) [the instant case].

"3. *Texas Gulf Coast Area*

"Opinion Nos. 595 and 595–A, 45 FPC 674 and 46 FPC 827, respectively (1971), reversed and remanded *sub nom. Public Service Commission of the State of New York, et al.* v. *F. P. C.*, 487 F. 2d 1043 (D. C. Cir. 1973), certiorari pending *sub nom. Shell Oil Co., et al.* v. *Public Service Commission of the State of New York, et al.* (Sup. Ct. Nos. 73–966, *et al.*, filed December 22, 1973).

"4. *Hugoton-Anadarko Area*

"Opinion No. 586, 44 FPC 761 (1970), affirmed *sub nom. People of the State of California, et al.* v. *F. P. C.*, 466 F. 2d 974 (9th Cir. 1972).

"5. *Other Southwest Area*

"Opinion Nos. 607 and 607–A, 46 FPC 900 and 47 FPC 99, respectively (1971), affirmed *sub nom. Shell Oil Co., et al.* v. *F. P. C.*,

is the second area rate case to reach this Court. The first was the *Permian Basin Area Rate Cases*, 390 U. S. 747 (1968), in which the Court sustained the constitu-

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484 F. 2d 469 (5th Cir. 1973), certiorari pending *sub nom. Mobil Oil Corp.* v. *F. P. C.* (Sup. Ct. No. 73–438, filed September 6, 1973).

"6. *Appalachian and Illinois Basin*

"Order Nos. 411, 411–A and 411–B, 44 FPC 1112, 1334 and 1487, respectively (1970) (these orders were never appealed).

"The Commission declined to establish new area rates for this area in Opinion No. 639, 48 FPC 1299 (1972), affirmed *sub nom. Shell Oil Co., et al.* v. *F. P. C.*, — F. 2d — (5th Cir. Nos. 73–1369, *et al.*, decided March 14, 1974).

"7. *Rocky Mountain Area*

"Opinion Nos. 658 and 658–A, 49 FPC 924 and — FPC —, respectively (1973), petition for review filed and dismissed on motion of petitioner *sub nom. Exxon Corporation* v. *F. P. C.* (D. C. Cir. No. 73–1854, dismissed February 22, 1974).

"Opinion Nos. 658 and 658–A prescribed just and reasonable rates for gas produced in this area from wells commenced prior to January 1, 1973 and sold under contracts dated prior to October 1, 1968. Sales from this area which are not covered by the rates established in Opinion Nos. 658 and 658–A will be governed by the rates prescribed in the Commission's pending nationwide rate proceedings (see below). Pending completion of the nationwide proceedings, such sales are being permanently certified under Section 7 of the Natural Gas Act, 15 U. S. C. 717f, at the initial rates prescribed in Order No. 435, 46 FPC 68 (1971) *sub nom. American Public Gas Association, et al.* v. *F. P. C.* (D. C. Cir. Nos. 72–1812, *et al.*, May 23, 1974)."

The Commission further advises that "[p]roceedings to establish uniform nationwide rates for all jurisdictional producer sales have been instituted at the Commission. When these proceedings are completed, the rates prescribed therein will supersede all area rates. As to gas from wells commenced on or after January 1, 1973, *see;*

"Notice of Proposed Rulemaking and Order Prescribing Procedures, 38 *Fed. Reg.* 10014 (Docket No. R–389–B, issued April 11, 1973).

"As to gas from wells commenced prior to January 1, 1973, *see;*

"Notice of Proposed Rulemaking and Order Prescribing Procedures,

tional and statutory authority of the Commission to adopt a system of area regulation and to impose supplementary requirements in the discharge of its responsibilities under §§ 4 and 5 of the Natural Gas Act[4] to determine whether producers' rates are just and reasonable.

The Court of Appeals affirmed the 1971 order in its

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38 *Fed. Reg.* 14295 (Docket No. R–478, issued May 23, 1973)." Memorandum from General Counsel, FPC (May 17, 1974).

As to the Commission's shift from individual ratemaking through an adjudicative procedure to area ratemaking through a rulemaking procedure, see Dakin, Ratemaking as Rulemaking—The New Approach at the FPC: Ad Hoc Rulemaking in the Ratemaking Process, 1973 Duke L. J. 41.

[4] Sections 4 (a) and 5 (a), 15 U. S. C. §§ 717c (a) and 717d (a), respectively provide:

§ 4 (a) "All rates and charges made, demanded, or received by any natural-gas company for or in connection with the transportation or sale of natural gas subject to the jurisdiction of the Commission, and all rules and regulations affecting or pertaining to such rates or charges, shall be just and reasonable, and any such rate or charge that is not just and reasonable is declared to be unlawful."

§ 5 (a) "Whenever the Commission, after a hearing had upon its own motion or upon complaint of any State, municipality, State commission, or gas distributing company, shall find that any rate, charge, or classification demanded, observed, charged, or collected by any natural-gas company in connection with any transportation or sale of natural gas, subject to the jurisdiction of the Commission, or that any rule, regulation, practice, or contract affecting such rate, charge, or classification is unjust, unreasonable, unduly discriminatory, or preferential, the Commission shall determine the just and reasonable rate, charge, classification, rule, regulation, practice, or contract to be thereafter observed and in force, and shall fix the same by order: *Provided, however,* That the Commission shall have no power to order any increase in any rate contained in the currently effective schedule of such natural gas company on file with the Commission, unless such increase is in accordance with a new schedule filed by such natural gas company; but the Commission may order a decrease where existing rates are unjust, unduly discriminatory, preferential, otherwise unlawful, or are not the lowest reasonable rates."

entirety as an appropriate exercise of administrative discretion supported by substantial evidence on the record as a whole. *Placid Oil Co.* v. *FPC*, 483 F. 2d 880 (1973). We granted the petitions for certiorari in these three cases [5] to review the correctness of the Court of Appeals' holding sustaining the 1971 order as in all respects within the Commission's statutory powers, and to determine whether the Court of Appeals misapprehended or grossly misapplied the substantial-evidence standard. 414 U. S. 1142 (1974). We affirm.

I

The Commission first instituted proceedings to establish an area rate structure for the Southern Louisiana area on May 10, 1961. 25 F. P. C. 942. The area consists of the southern portion of the State of Louisiana and the federal and state areas of the Gulf of Mexico off the Louisiana coast. The area accounts for about one-third of the Nation's domestic natural gas production

[5] Petitioner in No. 73–437, Mobil Oil Corp., is a major producer of natural gas in the Southern Louisiana area. Petitioner in No. 73–457, Public Service Commission of the State of New York and petitioner in No. 73–464, Municipal Distributors Group—a group of approximately 200 municipally owned gas distributors—represent major consumer interests. Hereafter in this opinion they will be referred to respectively as "Mobil," "New York," and "MDG." Although all three attack at times the same provisions of the 1971 order, the attacks make different arguments as best serve the self-interest of the particular petitioner. Thus, the ceiling rate for flowing gas established by the Commission includes a noncost factor designed to facilitate investment by producers in exploration and development of new gas reserves. Mobil, understandably concerned with higher prices, argues that the noncost addition is not enough; indeed, that the rates fixed both for flowing gas and for new gas are too low. New York and MDG, on the other hand, concerned with lower prices, object that the rates for flowing gas are too high and reduce the level of refund obligations.

and has been described as "the most important gas-producing area in the country." *Southern Louisiana Area Rate Cases*, 428 F. 2d 407, 418 (CA5 1970) (hereafter *SoLa I*). Proceedings continued over seven years.[6] On September 25, 1968, the Commission issued an order establishing an area rate structure, 40 F. P. C. 530, and, on March 20, 1969, a modified order on rehearing, 41 F. P. C. 301.[7] Refunds under this structure for overcharges during the pendency of the proceeding amounted to some $375 million.[8]

An appeal was taken to the Court of Appeals for the Fifth Circuit. On March 19, 1970, the Court of Appeals

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[6] Approximately five years were consumed by hearings, and the trial examiner's opinion issued on December 30, 1966, 40 F. P. C. 703.

[7] Pursuant to its authority, upheld in *Permian*, to use price flexibly, the Commission established three "vintages" for onshore gas delivered under contracts made, respectively, (1) before 1961, (2) between January 1, 1961, and October 1, 1968, and (3) after October 1, 1968. It set price ceilings for the three vintages, respectively, at 18.5¢ per thousand cubic feet (Mcf), 19.5¢ per Mcf, and 20¢ per Mcf. For offshore gas in the federal domain, which is not subject to the Louisiana severance tax, the ceilings were 1.5¢ per Mcf below onshore levels. The Commission also ordered refunds aggregating approximately $375 million for gas sold and delivered between the initiation of the proceedings and the effective date of its opinion, October 1, 1968, at prices above the established pre-October 1 ceilings. Finally, it established, subject to the right of individual producers to petition for exceptions, an indefinite moratorium on rate increases above the pre-October 1 ceilings, and a moratorium until January 1, 1974 (over five years), on rate increases above the post-October 1 maximum. Such moratoria provide for automatic suspension of any rate filing, without determination of justness and reasonableness. See, *e. g.*, *United Gas* v. *Callery Properties*, 382 U. S. 223 (1965).

[8] As of the end of 1970, the precise amount of these refunds was $376,428,000, see 5 App. 237e, but they were accruing interest under terms of the Commission's order. Opinion No. 546, 40 F. P. C. 530 (1968).

affirmed the FPC orders but with "serious misgivings," *SoLa I*, *supra*, at 439. Noting that "[a] serious shortage, in fact, may already be unavoidable . . . ," *id.*, at 437, the Court of Appeals was critical of the Commission's failure adequately to assess "supply and demand in either a semi-quantitative or qualitative way," *id.*, at 436. It was reinforced in this view by the evidence, including an FPC Staff Report, issued while the appeal was pending,[9] that the Nation was faced with "a severe gas shortage, with disastrous effects on consumers and the economy alike." *Id.*, at 435 n. 87.

Therefore, although determining "that affirmance is the best course," *id.*, at 439, the Court of Appeals declared that the judgment was not in any wise to foreclose the Commission from making such changes in its orders, as to both past and future rates, as it found to be in the public interest. The court noticed the fact that, while the appeal was pending, the Commission, in March 1969, had instituted proceedings to reconsider rates for the offshore portion of Southern Louisiana, see 41 F. P. C. 378, and later that year expanded the procedure to include the entire area, 42 F. P. C. 1110. Thus, it stated:

> "The mandate of this Court should not, however, be interpreted to interfere with Commission action that would change the rates we have approved here. We

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[9] See *SoLa I*, 428 F. 2d 407, 435 n. 87 (CA5 1970). This report was updated by FPC Staff Report No. 2, National Gas Supply and Demand 1971–1990 (1972), which states in part: " 'The emergence of a natural gas shortage during the past two years marks a historic turning point—the end of natural gas industry growth uninhibited by supply considerations. . . . For practical short-term purposes we are confronted with the fact that current proven reserves in the lower 48 states . . . have dropped from 289.3 trillion cubic feet [Tcf] in 1967 to 259.6 in 1970, a 10.3 percent drop within a three-year period. . . .' " *FPC* v. *Louisiana Power & Light Co.*, 406 U. S. 621, 626 n. 2 (1972).

> specifically and emphatically reject the contention advanced . . . that the Commission has no power to set aside rates once determined by it to be just and reasonable when it has reason to believe its determinations may have been erroneous. In fact, the existence of the new proceedings, which as we understand them will take into account many of the issues whose absence has concerned us here, has been one of the factors we have considered in deciding to affirm the Commission's decisions." 428 F. 2d, at 444–445.

Pending decision on petitions for rehearing, however, the Commission advised the Court of Appeals, in a letter requested by the court, that, unless that court otherwise directed, it did not believe that it had authority to modify, rescind, or set aside a rate order or moratorium affirmed by the court. The Court of Appeals answered in its opinion denying rehearing, 444 F. 2d 125, 126–127 (1970):

> "We wish to make crystal clear the authority of the Commission in this case to reopen *any* part of its order that circumstances require be reopened. Under section 19 (b) of the Natural Gas Act, this Court has the broad remedial powers that inhere in a court of equity, and pursuant to our equitable powers we make it part of the remedy in this case that the authority of the Commission to reopen any part of its orders, including those affecting revenues from gas already delivered, is left intact. The Commission can make retrospective as well as prospective adjustments in this case if it finds that it is in the public interest to do so.
>
> "At the same time, we emphasize that our judgment is an affirmance and not a remand. The appropriate place for originally considering what

parts of the orders must be reopened in light of new evidence is before the Commission. It may be that the Commission will decide that the refunds it has ordered are just and reasonable or at least that their significance to the public interest is outweighed by the confusion and delay that would result from their reopening. In this event, the Commission will allow its refund orders to stand as they are. Or it may be that the refunds are too burdensome in light of new evidence to be in the public interest. In that case, it is our judgment that the Commission shall have the power and the duty to remedy the situation by changing its orders."

The Commission thereupon formally reopened the 1961 proceeding and consolidated it with the new proceeding, 44 F. P. C. 1638 (1970).[10] An extensive record of many thousands of pages of testimony and more than a hundred exhibits was compiled between April 1970 and March 1971.[11] Pursuant to the instructions of the Court of Appeals, much of the evidence focused on the gas shortage, projected levels of demand, and estimates of new supply needed to alleviate the problem. Evidence was also adduced bearing upon rate levels needed to induce additional supply, the potential industry consequences of any new order, and new cost trends based on data unavailable at the time of the earlier proceedings.

Contemporaneously with the hearings, settlement conferences were instituted, on motion, by the Presiding Examiner, 46 F. P. C. 86, 103 (1971), and those conferences were attended by producers, pipelines, distributors,

[10] On January 26, 1971, the consolidated proceeding was expanded to include all rate certification proceedings that had been, or would have been, initiated in the Southern Louisiana area during the pendency of the case. Pet. for Cert. of New York 9.

[11] 46 F. P. C., at 101.

state commissions, municipally owned utilities, and the Commission staff. Eventually, a settlement proposal was submitted by one of the parties,[12] and, after being placed on the record for comments, it was agreed to by a large majority of all interests.[13] An intermediate decision of the Presiding Examiner was waived, and the Commission took up the case.

At the outset, the Commission stated that it believed that adoption of the settlement proposal was precluded unless the Commission found the terms to be in the public interest and supported by substantial evidence.[14]

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[12] United Distribution Companies, a group of 32 major distribution companies. *Id.*, at 103 n. 25.

[13] The Commission's tabulation stated:

"In support of the settlement proposal are 32 major distribution companies representing 25 percent of the gas distribution operations in the United States, serving about 10.3 million customers at retail; 55 gas distribution companies which supply gas service to more than 10 million customers; *all* interstate pipelines purchasing gas from the Southern Louisiana area; and 46 natural gas producers, comprising 80 percent of the total gas production flowing from the area. . . . The Commission staff likewise supported the settlement proposal." *Id.*, at 103.

[14] The Commission opinion states:

"We have more than a settlement proposal before us. We have the entire record made in the original Southern Louisiana proceedings, plus the record opened with the institution of Docket No. AR 69–1 and concluded after Docket No. AR 61–2 was consolidated with it. The settlement proposal was obviously heavily influenced by the teachings of [*SoLa I*], as the parties perceived those teachings, and so was the record made in conjunction with it. It is our duty to review that record and to make findings thereon, and to come to conclusions therefrom. Only if substantial evidence supports it can we approve the settlement proposal, and this means that we must analyze supply and demand, supply-cost relationships, and costing methodology. Rate design, incentives, refunds, and economic considerations, as the record permits insight into these matters, must also be discussed." *Id.*, at 106.

Accordingly, the Commission evaluated the proposal in the light of the massive record that had been compiled in the decade since 1961, including the additional year of hearings directed in large part to the terms of the settlement proposal and the nature of the supply shortage. The Commission concluded that the terms of the proposed settlement were just and reasonable, and found them to be supported by substantial evidence in the record.[15] The ceiling rates established in the 1968 orders, which because of Commission and court stays had never gone into effect, were held "now [to] perform no office," 46 F. P. C., at 102.

The effective date of the 1971 order was August 1, 1971. By the terms of this order "flowing gas," *i. e.*, gas delivered after August 1, 1971, under contracts dated prior to October 1, 1968, receives treatment different from "new gas," *i. e.*, gas delivered after August 1, 1971, under contracts dated after October 1, 1968. The established flowing gas price ceilings are 22.275¢ per thousand cubic feet (Mcf) for gas produced onshore and 21.375¢ per Mcf for gas produced offshore. The established new gas price ceilings are 26¢ for both onshore and offshore gas.

Flowing gas ceilings automatically increased 0.5¢ per Mcf on October 1, 1973, and, as a further incentive for increasing the gas supply, the Commission also established increases up to 1.5¢ per Mcf, contingent upon the industry's finding and dedicating new gas reserves.[16] New

[15] The Commission's conclusion that the rates were just and reasonable is to be found in 46 F. P. C., at 110. Conclusions that they were supported by substantial evidence appear throughout the opinion following appropriate examination of the record evidence. See, *e. g.*, *id.*, at 131, 137–138, 142.

[16] Under the formula if, before October 1, 1977, the industry as a whole finds and dedicates to the interstate market new gas reserves in the Southern Louisiana area of seven and one half Tcf, the rate

gas rates automatically increase 1¢ per Mcf on October 1, 1974. A moratorium is imposed upon the filing of producer rate increases for flowing gas until October 1, 1976, and for new gas until October 1, 1977.

The Commission also established minimal pipeline rates to be charged producers by pipelines for the transportation of certain liquid and liquefiable hydrocarbons, and eliminated the price differential between casinghead gas (gas dissolved in or associated with the production of oil) and new gas-well gas that it had imposed in earlier cases. 46 F. P. C., at 144. See *Permian Basin*, 390 U. S., at 760–761.

The problem of refunds concerns deliveries of flowing gas prior to August 1, 1971. The rates established by the 1971 order were higher than those that would have been established under the 1968 order had they been put into effect.[17] If refunds had been calculated on the basis of the 1968 order, they would have aggregated over $375 million. If they had been calculated upon the basis of the 1971 flowing gas ceiling rates, refunds would have aggregated less than $150 million. However, the proposed settlement stipulated a refund obligation of $150 million, with a proviso that this could be worked off by the commitment by a refund obligor of additional gas reserves to the interstate market.[18] The Commis-

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for flowing gas will escalate by 0.5¢; if, prior to that date, such reserves equal eleven and one quarter Tcf, the rate will increase by an additional 0.5¢; if, prior to the same date, such reserves equal 15 Tcf, a final 0.5¢ escalation will become effective. *Id.*, at 143.

[17] The rates that would have been established had the 1968 orders become effective ranged from 17¢ per Mcf to 20¢ per Mcf.

[18] The Commission's formula works thus: Any company with a "refund obligation" to any natural gas pipeline company is allowed to reduce the refund obligation by one cent for each Mcf of new gas reserves committed to the interstate market in the Southern Louisiana area during the period ending October 1, 1977. Any portion of the

sion adopted this proposal as an integral part of the 1961–1971 rate structure and established a schedule aggregating $150 million of refunds from those that were owed but not yet paid by producers who had collected rates in excess of certain prescribed levels lower than the established flowing gas rates.[19]

II

Before addressing petitioners' arguments, we must consider briefly the situation in which the Commission has found itself in its attempts to regulate the natural gas market; the teachings of *Permian Basin* and other decisions of this Court as to the extent of the Commis-

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"refund obligation" not so discharged is payable in cash with interest, subject to certain special relief provisions for producers who either achieve 65% of their obligations by August 1, 1976, or who have nonetheless made a "sincere and diligent effort" to discharge them. Opinion No. 598–A, 46 F. P. C. 633, 641 (1971). The producer is required to commit, or give right of first refusal to, at least 50% of the new reserves to the purchaser to whom the refund would otherwise be payable. The reserves committed to reduce the refund obligation may not be counted by the producer committing those reserves as a part of the industry reserves required to trigger the escalated prices for flowing gas referred to in n. 16 above.

[19] The rate levels for refund purposes are as follows:

(a) For deliveries prior to January 1, 1965, 20.625¢ per Mcf for onshore gas and 19.625¢ per Mcf for offshore gas.

(b) For deliveries from January 1, 1965, to September 30, 1968, 21.25¢ per Mcf for onshore gas and 20.25¢ per Mcf for offshore gas.

(c) For deliveries from October 1, 1968, to January 1, 1971, 30.5% of the difference between revenues during this period based on rates prior to October 1, 1970, and the revenues that would have resulted during this period through the application of rates established in *SoLa I*, as modified. This percentage factor of 30.5 may be increased to as high as 33% to produce the $150 million refund total.

(d) For deliveries after January 1, 1971, base area rates prescribed in the 1971 order, see 46 F. P. C., at 140.

sion's statutory authority in this area; the limitations upon review by the Court of Appeals of the Commission's order; and the limitations upon review by this Court of the Court of Appeals' affirmance of the order.

The history of the Commission's early experience with the Natural Gas Act, 15 U. S. C. § 717 *et seq.*, has been fully developed in our first area rate opinion, *Permian Basin, supra,* at 755–759, and may be merely summarized here. With the passage of the Act in 1938, 52 Stat. 821, Congress gave the Commission authority to determine and fix "just and reasonable rate[s]," § 5 (a), 15 U. S. C. § 717d (a),[20] for the "sale in interstate commerce of natural gas for resale for ultimate public consumption for domestic, commercial, industrial, or any other use . . . ." § 1 (b), 15 U. S. C. § 717 (b).[21] The Act was patterned after earlier regulatory statutes that applied to traditional public utilities and transportation companies, and that provided for setting rates equal to such companies' costs of service plus a reasonable rate of return.[22]

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[20] See n. 4, *supra.*

[21] Section 717 (b) provides:

"The provisions of this chapter shall apply to the transportation of natural gas in interstate commerce, to the sale in interstate commerce of natural gas for resale for ultimate public consumption for domestic, commercial, industrial, or any other use, and to natural-gas companies engaged in such transportation or sale, but shall not apply to any other transportation or sale of natural gas or to the local distribution of natural gas or to the facilities used for such distribution or to the production or gathering of natural gas."

[22] See, *e. g.*, Interstate Commerce Act, 49 U. S. C. § 1 *et seq.* See Kitch, Regulation of the Field Market for Natural Gas by the Federal Power Commission, 11 J. Law and Econ. 243 (1968); Note, Legislative History of the Natural Gas Act, 44 Geo. L. J. 695, 702, 704 (1956).

The contention was early made that in regulating the ultimate source of a production, here the natural-gas producer, the problem is not to ensure a reasonable rate of return, but to use prices func-

Until 1954, the Commission construed its mandate as requiring that it regulate the chain of distribution of natural gas only from the point where an interstate pipeline acquired it.[23] Because such pipelines were relatively

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tionally to produce a supply that will satisfy a socially selected level of demand, and efficiently to allocate that supply. See *FPC* v. *Hope Natural Gas Co.*, 320 U. S. 591, 629 (1944) (separate opinion of Jackson, J.):

"The heart of this problem is the elusive, exhaustible, and irreplaceable nature of natural gas itself. Given sufficient money, we can produce any desired amount of railroad, bus, or steamship transportation, or communications facilities, or capacity for generation of electric energy, or for the manufacture of gas of a kind. In the service of such utilities one customer has little concern with the amount taken by another, one's waste will not deprive another, a volume of service can be created equal to demand, and today's demands will not exhaust or lessen capacity to serve tomorrow. But the wealth of Midas and the wit of man cannot produce or reproduce a natural gas field."

Compare, for a review of the possible purposes of natural gas regulation and the arguments for and against the scheme of the Natural Gas Act, Breyer & MacAvoy, The Natural Gas Shortage and the Regulation of Natural Gas Producers, 86 Harv. L. Rev. 941, especially 944–952 (1973).

[23] See *Columbian Fuel Corp.*, 2 F. P. C. 200 (1940); cases cited in *Permian Basin*, 390 U. S., at 756 n. 7. Section 1 (b), 15 U. S. C. § 717 (b), exempts "the production or gathering of natural gas" from the Act.

Both the reason for the Commission's view and the logical infirmity in it appear in the legislative history of the Act. The growing concentration of natural gas pipelines had led to traditional abuses associated with monopoly power—limitation of supply, discriminatory pricing, and barriers to entry. Hearings on H. R. 4008 before the House Committee on Interstate and Foreign Commerce, 75th Cong., 1st Sess., 47, 70–73, 89–91, 101–103 (1937). The States first proved incapable of combating these foreign corporations, *id.*, at 50, 93, and then were barred by decisions of this Court holding that such regulation violated the Interstate Commerce Clause. See, *e. g.*, *Peoples Natural Gas Co.* v. *Public Service Comm'n*, 270 U. S. 550 (1926).

Congress' response was to take over where the States' power ceased, following the chain of distribution back into the interstate market,

few in number [24] and fell within the transportation company model, the Commission was able to apply a traditional regulatory approach, using individualized costs of service as a basis for determining price.[25]

In 1954, however, this Court ruled in *Phillips Petroleum Co.* v. *Wisconsin*, 347 U. S. 672, that independent producers are "[n]atural-gas compan[ies]" within the meaning of § 2 (6) of the Act, 15 U. S. C. § 717a (6).[26] In response, the Commission at first attempted to extend to this new industry its old regulatory methods, including establishment of individual rates based on each producer's costs of service.[27] The effort foundered on the sheer

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and it quite naturally used a public utility model. But, once begun, prevention of the circumvention of such regulation virtually compelled extension of control to the source.

Although the debate continues today as to whether the production of natural gas is, or has the potential to be, competitive, compare Diener, Area Price Regulation in the Natural Gas Industry of Southern Louisiana, 46 Tul. L. Rev. 695 (1972) (not competitive), with Breyer & MacAvoy, The Natural Gas Shortage and the Regulation of Natural Gas Producers, 86 Harv. L. Rev. 941 (1973) (competitive), revision of the regulation required by the Act is a matter for consideration by the Congress, not by this Court. See *FPC* v. *Texaco, post*, at 400–401.

[24] Prior to the *Phillips* case there were fewer than 200 pipeline companies subject to Commission regulation. Statement of General Policy No. 61–1, 24 F. P. C. 818 (1960). Immediately prior to passage of the Act, four holding company groups controlled over 55% of the Nation's pipeline mileage. Hearings on H. R. 11662 before a Subcommittee of the House Committee on Interstate and Foreign Commerce, 74th Cong., 2d Sess., 12, 52 (1936).

[25] See *Phillips Petroleum Co.*, 24 F. P. C. 537, 542 (1960).

[26] Section 717a provides:

"When used in this chapter, unless the context otherwise requires—

. . . . . .

"(6) 'Natural-gas company' means a person engaged in the transportation of natural gas in interstate commerce, or the sale in interstate commerce of such gas for resale."

[27] See *Phillips Petroleum Co., supra*, at 542.

size of the task—thousands of independent producers being engaged in jurisdictional sales of gas at that time.[28]

In the early 1960's the Commission discontinued its attempts to deal with individual companies,[29] and turned to the area rate method. The Commission established a number of discrete geographical areas within which it believed that costs and general operating conditions were reasonably similar,[30] and set out to establish, by convening hearings and compiling massive records, uniform rate schedules that would govern all producers within each area. Upon the conclusion of the first of these undertakings, we reviewed the Commission's efforts and found no reversible error. *Permian Basin Area Rate Cases*, 390 U. S. 747 (1968). See *Wisconsin* v. *FPC*, 373 U. S. 294 (1963).

But, the Commission was soon confronted with indications, both from data available to it,[31] and from criticism of its effort,[32] that its cost emphasis in rate determination was being accompanied by a severe shortage in the supply of natural gas being dedicated to the interstate market. Since the Commission's subsequent area rate orders,[33] including both its 1968 and 1971 orders, are adapted from the initial *Permian Basin* model and are governed by the same statutory provisions concern-

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[28] Various statistics presented by the Commission in its *Phillips* opinion on remand indicated a total of 3,372 independent producers with rates on file and an estimated backlog so large that, if the staff of the Commission were tripled, it would take over 82 years to reach current status. 24 F. P. C., at 545–546.

[29] Statement of General Policy No. 61–1, 24 F. P. C. 818 (1960).

[30] *Ibid.*

[31] See Opinion No. 598, 46 F. P. C., at 112–114 (American Gas Association, Committee on Natural Gas Reserves, Annual Reports).

[32] See, *e. g.*, Kitch, *supra*, n. 22, at 276–280. See also *Permian Basin*, 390 U. S., at 816–817.

[33] See n. 3, *supra*.

ing ratemaking and judicial review, we will preface our discussion of the Commission's response to these difficulties with a brief review of the *Permian Basin* order and the applicable rules laid down in our opinion sustaining that order.

Subsequent to its establishment of geographical areas in 1961,[34] the Commission consolidated three of those areas to form the Permian Basin area. The rate structure devised for this area set two ceiling prices, the higher one for gas produced from gas wells and dedicated to interstate commerce after January 1, 1961, and the other for gas-well gas dedicated to interstate commerce before January 1, 1961, and all gas produced from oil wells (casinghead gas) either associated with the production of the oil or dissolved in it.[35] The Commission derived the higher rate for the newer "vintage" gas-well gas from composite cost data obtained both from answers to producer questionnaires and from published data said to reflect the national costs of finding and producing gas-well gas in 1960.[36] It derived the lower rate from Permian Basin historical cost data for the older vintage gas-well gas, and applied that rate to both that and casinghead gas without distinction.[37] To these composite costs, the Commission added a return of 12% [38] on the producers' average production investment,[39] obtained by examining the cost data, imputing a rate base, and assuming that gas wells deplete at a constant rate beginning one year after investment and ending 20

[34] Statement of General Policy No. 61–1, *supra*.

[35] *Permian Basin, supra,* at 759–760.

[36] *Id.,* at 761.

[37] *Ibid.;* cf. *infra,* at 329–330.

[38] The Commission has raised the rate of return to 15% in the instant case. 46 F. P. C., at 131.

[39] Cf. *ibid.*

years later.[40] Finally, an adjustment up or down from the area ceiling rates was specified for gas of higher or lower quality and energy content than set by a selected standard.[41] The resulting ceiling rates, including allowances for state taxes, were 14.5¢ per Mcf for first vintage and casinghead gas, and 16.5¢ for second vintage gas. For those producers who individually might suffer hardship under this rate schedule, the Commission indicated that it would on rare occasions provide special relief, but it declined to specify what circumstances would justify such action.[42]

On review, the Court of Appeals refused to approve the Commission's order, holding that certain determinations of the ultimate effects of the order had not been made as required by *FPC* v. *Hope Natural Gas Co.*, 320 U. S. 591 (1944), that more precise delineation of the requirements for relief from the order must be set forth, and that the Commission could not require that producers refund excess charges during the pendency of the proceeding unless it concluded that aggregate actual area revenues exceeded aggregate permissible area revenues, and then apportioned only the excess among producers on an equitable basis. 375 F. 2d 6, 36 (1967).

On certiorari, this Court initially noted that judicial review of the Commission's orders is extremely limited:

> "Section 19 (b) of the Natural Gas Act provides without qualification that the 'finding of the Commission as to the facts, if supported by substantial

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[40] Cf. *ibid.*

[41] See 46 F. P. C., at 143: "The maximum standard will be 1050 Btu's per cubic foot of gas, . . . and the minimum standard will be 1000 Btu's per cubic foot of gas." Adjustments outside this range are to be on a proportional basis. This was the standard used in *Permian Basin*, see 390 U. S., at 762–763.

[42] *Id.*, at 770–771.

evidence, shall be conclusive.' More important, we have heretofore emphasized that Congress has entrusted the regulation of the natural gas industry to the informed judgment of the Commission, and not to the preferences of reviewing courts. A presumption of validity therefore attaches to each exercise of the Commission's expertise, and those who would overturn the Commission's judgment undertake 'the heavy burden of making a convincing showing that it is invalid because it is unjust and unreasonable in its consequences.' *FPC* v. *Hope Natural Gas Co., supra,* at 602. We are not obliged to examine each detail of the Commission's decision; if the 'total effect of the rate order cannot be said to be unjust and unreasonable, judicial inquiry under the Act is at an end.' *Ibid.*

"Moreover, this Court has often acknowledged that the Commission is not required by the Constitution or the Natural Gas Act to adopt as just and reasonable any particular rate level; rather, courts are without authority to set aside any rate selected by the Commission which is within a 'zone of reasonableness.' *FPC* v. *Natural Gas Pipeline Co.,* 315 U. S. 575, 585. No other rule would be consonant with the broad responsibilities given to the Commission by Congress; it must be free, within the limitations imposed by pertinent constitutional and statutory commands, to devise methods of regulation capable of equitably reconciling diverse and conflicting interests." *Permian Basin,* 390 U. S., at 767.

Applying these limitations in the context of review of area rate regulation, *Permian Basin* defined the criteria governing the scope of judicial review as follows:

"First, [the reviewing court] must determine whether the Commission's order, viewed in light of

> the relevant facts and of the Commission's broad regulatory duties, abused or exceeded its authority. Second, the court must examine the manner in which the Commission has employed the methods of regulation which it has itself selected, and must decide whether each of the order's essential elements is supported by substantial evidence. Third, the court must determine whether the order may reasonably be expected to maintain financial integrity, attract necessary capital, and fairly compensate investors for the risks they have assumed, and yet provide appropriate protection to the relevant public interests, both existing and foreseeable. *The court's responsibility is not to supplant the Commission's balance of these interests with one more nearly to its liking, but instead to assure itself that the Commission has given reasoned consideration to each of the pertinent factors.*" *Id.*, at 791–792 (emphasis supplied).

Where application of these criteria discloses no infirmities in the Commission's order, the order cannot be said to produce an "arbitrary result," and must be sustained. *FPC* v. *Hope Natural Gas Co.*, 320 U. S., at 602.

Applying these criteria, *Permian* reversed the Court of Appeals and sustained the Commission's order, although noting that the Commission had not adhered rigidly to a cost-based determination of rates, much less to one that based each producer's rates on his own costs.[43] Each deviation from cost-based pricing was found not to be unreasonable and to be consistent with the Commission's responsibility to consider not merely

[43] Indeed, in addition to its general approval of such an approach, see 390 U. S., at 814–815, the Court in *Permian Basin* listed each of the noncost factors used by the Commission and approved them. See *id.*, at 815 n. 98.

the interests of the producers in "maintain[ing] financial integrity, attract[ing] necessary capital, and fairly compensat[ing] investors for the risks they have assumed," but also "the relevant public interests, both existing and foreseeable." 390 U. S., at 792. "The Commission's responsibilities necessarily oblige it," the Court said, "to give continuing attention to values that may be reflected only imperfectly by producers' costs; a regulatory method that excluded as immaterial all but current or projected costs could not properly serve the consumer interests placed under the Commission's protection." *Id.*, at 815.

Permian Basin teaches that application of the three criteria of judicial review of Commission orders is primarily the task of the courts of appeals. For "this [the Supreme] Court's authority is essentially narrow and circumscribed." *Id.*, at 766. The responsibility to assess the record to determine whether agency findings are supported by substantial evidence is not ours. Section 19 (b) of the Act [44] provides that "[t]he judgment

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[44] Section 19 (b), 15 U. S. C. § 717r (b), states:

"(b) Any party to a proceeding under this chapter aggrieved by an order issued by the Commission in such proceeding may obtain a review of such order in the court of appeals of the United States for any circuit wherein the natural-gas company to which the order relates is located or has its principal place of business, or in the United States Court of Appeals for the District of Columbia, by filing in such court, within sixty days after the order of the Commission upon the application for rehearing, a written petition praying that the order of the Commission be modified or set aside in whole or in part. . . . Upon the filing of such petition such court shall have jurisdiction, which upon the filing of the record with it shall be exclusive, to affirm, modify, or set aside such order in whole or in part. . . . The finding of the Commission as to the facts, if supported by substantial evidence, shall be conclusive. . . . The judgment and decree of the court, affirming, modifying, or setting aside, in whole or in part, any such order of the Commission, shall be final,

and decree of the [Court of Appeals] affirming, modifying, or setting aside, in whole or in part, any such order of the Commission, shall be final, subject to review by the Supreme Court . . . upon certiorari . . . ." We have held as to a like provision in the National Labor Relations Act, 29 U. S. C. § 160 (e), that thus "[w]hether on the record as a whole there is substantial evidence to support agency findings is a question which Congress has placed in the keeping of the Courts of Appeals. This Court will intervene only in what ought to be the rare instance when the standard appears to have been misapprehended or grossly misapplied." *Universal Camera Corp.* v. *NLRB*, 340 U. S. 474, 491 (1951).

III

Before reviewing the Court of Appeals' affirmance of the Commission's 1971 order for compliance with *Permian*'s requirements, we address contentions that challenge the statutory authority of the Commission to adopt the order, rather than the terms of the order itself. The first of these challenges, made by New York and MDG, is that the Commission had no statutory authority to change rates and refund obligations fixed in the Commission's 1968 order after that order was affirmed by the Court of Appeals in *SoLa I*. Brief for MDG 18; Brief for New York 15. The argument is that the affirmance was "unqualified" and therefore exhausted the Court of Appeals' powers of review under § 19 (b), thus rendering its authorization to the Commission to reopen its 1968 orders without legal effect. But the affirmance of the 1968 order was not "unqualified." Although the Commission could not have reopened the order on its own, see *Montana-Dakota Utilities Co.* v. *Northwestern*

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subject to review by the Supreme Court of the United States upon certiorari . . . ."

Public Service Co., 341 U. S. 246, 254 (1951); *FPC* v. *Hope Natural Gas Co.*, 320 U. S., at 618, the Court of Appeals' opinion on rehearing made it "crystal clear" that, despite the form of the court's judgment, the Commission was fully authorized to reopen any part of the 1968 order that seemed appropriate and necessary if evidence as to the future supply problem indicated that this should be done.

The Court of Appeals properly took this step in light of new information, unavailable at the time of the 1968 order, that suggested the possible inadequacy of the 1968 determination, although not necessarily an inadequacy that justified setting aside the order. See *Baldwin* v. *Scott County Milling Co.*, 307 U. S. 478 (1939). Moreover, the 1968 order had not been made effective, being continuously stayed until withdrawn by the 1971 order. See 46 F. P. C., at 101. In these circumstances, we cannot say that the action of the Court of Appeals exceeded its powers under § 19 (b) "to affirm, modify, or set aside [an] order in whole or in part."

This jurisdiction to review the orders of the Commission is vested in a court with equity powers, *Natural Gas Pipeline Co.* v. *FPC*, 128 F. 2d 481 (CA7 1942), see *Ford Motor Co.* v. *NLRB*, 305 U. S. 364, 373 (1939), and we cannot say that the Court improperly exercised those powers in the circumstances. *Dolcin Corp.* v. *FTC*, 94 U. S. App. D. C. 247, 255–258, 219 F. 2d 742, 750–752 (1954).[45] Indeed, § 19 (b) provides that the Court of

[45] New York asserts (Brief 17–18) that the Court of Appeals "does *not* sit as a court of equity in reviewing actions of an administrative agency . . . ." We agree with and adopt the Commission's answer to that contention, Brief for Federal Power Commission 24 n. 20: "But the case it cites for that proposition, *Federal Radio Commission* v. *General Electric Co.*, 281 U. S. 464, is wholly inapposite. The issue there was whether [the Supreme] Court had jurisdiction to review a decision of the Court of Appeals for the District of Columbia set-

Appeals may authorize the Commission in proper cases to take new evidence, upon which the Commission may modify its findings of fact and make recommendations concerning the disposition of its original order. Under the Court of Appeals disposition, the 1968 order was therefore not final and thus it was within the power of the Commission to reconsider and change it. See *United Gas Improvement Co.* v. *Callery Properties*, 382 U. S. 223, 229 (1965).

Only New York presses the second challenge to the Commission's statutory authority to adopt the 1971 order. New York contends that the Commission is without power to adopt as a rate order a settlement proposal that lacks unanimous agreement of the parties to the proceeding. That contention has no merit.

The Commission clearly had the power to admit the agreement into the record—indeed, it was obliged to consider it.[46] That it was admitted for the record did

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ting aside an order of the Federal Radio Commission. [The] Court held that it did not have jurisdiction, because under the pertinent statute the court of appeals, as a legislative court, was in effect 'a superior and revising agency' (281 U. S., at 467). The proceeding in the court of appeals thus 'was not a case or controversy in the sense of the judiciary article, but was an administrative proceeding, and therefore . . . the decision therein is not reviewable by [the Supreme] Court' (*id.*, at 470).

"[The Supreme] Court's statement that the court of appeals in such cases does not exercise 'ordinary jurisdiction at law or in equity' (*id.*, at 468) refers only to that court's former special role as a legislative court. It does not mean, as New York mistakenly infers, that reviewing courts exercising judicial rather than administrative jurisdiction do not sit as courts of equity. As [that] Court stated, the jurisdiction of reviewing courts under statutes similar to the Natural Gas Act is 'quite unlike the jurisdiction exercised on appeals from the Radio Commission' (*id.*, at 470)."

[46] Title 18 CFR § 1.18 (a) provides:

"(a) *To adjust or settle proceedings.* In order to provide opportunity for the submission and consideration of facts, arguments, offers

not, of course, establish without more the justness and reasonableness of its terms. But the Commission did not treat it as such. As we have noted,[47] the Commission weighed its terms by reference to the entire record in the Southern Louisiana area proceeding since 1961, and further supplemented that record with extensive testimony and exhibits directed at the proposal's terms.[48] We think that the Court of Appeals correctly analyzed the situation and stated the correct legal principles:

> "No one seriously doubts the power—indeed, the duty—of FPC to consider the terms of a proposed settlement which fails to receive unanimous support as a decision on the merits. We agree with the D. C. Circuit that even 'assuming that under the Commission's rules [a party's] rejection of the settlement rendered the proposal ineffective *as a settlement*, it could not, and we believe should not,

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of settlement, or proposals of adjustment, for settlement of a proceeding, or any of the issues therein, or consideration of means by which the conduct of the hearing may be facilitated and the disposition of the proceeding expedited, conferences between the parties to the proceeding and staff for such purposes may be held at any time prior to or during such hearings before the Commission or the officer designated to preside thereat as time, the nature of the proceeding, and the public interest may permit."

[47] See text accompanying nn. 7–8, *supra*.

[48] The Appendix filed in this Court, and containing only those portions of the record designated by the parties, includes over 800 pages of testimony and over 300 pages of exhibits from the reopened proceedings. We note that four different cost studies were presented. These studies estimated costs of production ranging from 18.2¢ to 24.03¢ per Mcf for gas flowing under contracts dated prior to October 1, 1968. With respect to gas sold under contracts dated on or after October 1, 1968, the cost estimates based on a 1969 test year ranged from 19.39¢ to 38.02¢. The rates ultimately fixed by the Commission, even including incentive increments, were within the range of cost estimates.

have precluded the Commission from considering the proposal *on its merits.*' Michigan Consolidated Gas Co. v. FPC, 1960, 108 U. S. App. D. C. 409, 283 F. 2d 204, 224 . . . .

. . . . . .

"As it should FPC is employing its settlement power under the APA, 5 U. S. C. A. § 554 (c), and its own rules 18 C. F. R. § 1.18 (a), to further the resolution of area rate proceedings. If a proposal enjoys unanimous support from all of the immediate parties, it could certainly be adopted as a settlement agreement if approved in the general interest of the public. But even if there is a lack of unanimity, it may be adopted as a resolution *on the merits,* if FPC makes an independent finding supported by 'substantial evidence on the record as a whole' that the proposal will establish 'just and reasonable' rates for the area." 483 F. 2d, at 893. (Emphasis in original.)

The choice of an appropriate structure for the rate order is a matter of Commission discretion, to be tested by its effects. The choice is not the less appropriate because the Commission did not conceive of the structure independently.

New York presents a final argument against the Commission's authority. It contends that the Court of Appeals' opinion on rehearing in *SoLa I* authorized modification of the 1968 refund provisions only if the 1968 refunds "are too burdensome in light of new evidence to be in the public interest." 444 F. 2d, at 127. It argues that this means the Commission was required first to find, based on substantial new evidence, that refunds "would substantially and adversely affect the producers' ability to meet the continuing gas needs of the interstate market," Brief for New York 18, and contends that the

revision of the refund terms is therefore unauthorized because the Commission made no such finding. New York's premise is unsupportable. The opinion on rehearing is explicit that the Commission was to have "great flexibility," and could "make retrospective as well as prospective adjustments in this case if it finds that it is in the public interest to do so." 444 F. 2d, at 126–127. Moreover, in the opinion under review, the Court of Appeals flatly rejected the argument New York has repeated in this Court. "[W]e categorically rejected [in *SoLa I*] the notion that the label 'affirmance' could possibly impair FPC's ability to alter or modify *any* of the provisions, particularly the refund provisions, of its *SoLa I* rate scheme if it believed that the exigencies of the gas industry required more effective remedial measures." 483 F. 2d, at 904 (emphasis in original).

IV

We turn now to petitioners' challenges to the rate order itself. We treat these contentions in three groups: challenges to the established price levels, challenges to the Commission's allocation of gas and receipts among pipelines and producers through the refund credits and contingent escalations, and, finally, claims that certain specific provisions of the rate order lack substantial evidence.

A

Petitioner Mobil contends that the rates fixed for both flowing or first vintage gas and new or second vintage gas are too low. New York and MDG attack the rates for flowing gas as too high, but do not attack the new-gas rates. Each of the arguments is premised on a common error: that certain provisions of the order can be isolated and viewed without regard to the total effect the order is designed to achieve.

Mobil's attack on the Commission's evidence of costs is clearly frivolous. The Commission took extensive evidence of costs in its 1968-order hearings for flowing gas, and in both its 1968-order and 1971-order hearings for new gas. In response to the Commission's rates, selected from the final cost "range" it found to be justifiable on the basis of the entire record, Mobil points to selected fragments of the record. We have examined the testimony cited and do not think that it sustains Mobil's heavy burden of showing that the final Commission choice was outside what the Court of Appeals could have found to lie within the Commission's authority. *FPC* v. *Natural Gas Pipeline Co.*, 315 U. S. 575, 585 (1942).

Mobil further contends that the inclusion of refund workoff credits and contingent escalations in the Commission's just and reasonable rates indicates that producers unable to gain part or all of their share of such payments will receive merely their "bare-bones" costs, which constitute illegally low prices. We do not question that such producers may receive less per unit of gas than will others. But that hardly invalidates the Commission's order. See *Permian Basin*, 390 U. S., at 818–819. Mobil's argument assumes that there is only one just and reasonable rate possible for each vintage of gas, and that this rate must be based entirely on some concept of cost plus a reasonable rate of return. We rejected this argument in *Permian Basin* and we reject it again here. The Commission explicitly based its additional "non-cost" incentives on the evidence of a need for increased supplies. Obviously a price sufficient to maintain a producer, while not itself necessarily required by the Act,[49] may not be sufficient also to encourage an increase

[49] See *Permian Basin*, 390 U. S., at 769–770. We said there: "[T]he just and reasonable standard of the Natural Gas Act 'coincides' with the applicable constitutional standards, *FPC* v. *Natural*

in production. As we said in *Permian Basin, supra,* at 796–798:

> "The supply of gas-well gas is therefore relatively elastic, and its price can meaningfully be employed by the Commission to encourage exploration and production. . . .
>
> ". . . We have emphasized that courts are without authority to set aside any rate adopted by the Commission which is within a 'zone of reasonableness.' . . . The Commission may, within this zone, employ price functionally in order to achieve relevant regulatory purposes; it may, in particular, take fully into account the probable consequences of a given price level for future programs of exploration and production. Nothing in the purposes or history of the Act forbids the Commission to require different prices for different sales, even if the distinctions are unrelated to quality, if these arrangements are 'necessary or appropriate to carry out the provisions of this Act.' . . . We hold that the statutory 'just and reasonable' standard permits the Commission to require differences in price for simultaneous sales of gas of identical quality, if it has permissibly found that such differences will effectively serve the regulatory purposes contemplated by Congress."

Plainly the Court of Appeals did not err in deciding that it was well within Commission discretion and exper-

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Gas Pipeline Co., [315 U. S. 575,] 586, and any rate selected by the Commission from the broad zone of reasonableness permitted by the Act cannot properly be attacked as confiscatory." *Id.*, at 770. The Court then refused to invalidate, without reference to particular cases, a Commission plan to provide " 'appropriate relief' if [a producer] establishes that its 'out-of-pocket expenses in connection with the operation of a particular well' exceed its revenue from the well under the applicable area price." *Id.*, at 770–771.

tise to conclude that the refund workoff credits and contingent escalations could provide opportunity for increased prices that would help in generating capital funds and in meeting rising costs, while assuring that such increases would not be levied upon consumers unless accompanied by increased supplies of gas. It is true that the Commission concluded that it could not determine the precise amount of additional gas supply that would be found and dedicated to interstate sales as a result of this formula. But this was also true of any change it might have made in gas prices. The Commission took massive evidence on supply, demand, and the relation between the two.[50] Its difficulties, while not minor,[51] did not stem from any failure to seek answers.

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[50] See n. 48, *supra*. The evidence is set out at length and discussed in 46 F. P. C., at 110–123.

[51] This is well exemplified by the problems arising from the fact that many costs are jointly incurred in the production of oil, gas, and other hydrocarbons. One witness testified that any number of accounting methods may be used to allocate such costs, and listed 10 of them. 4 App. 635–637. He further testified that these methods would produce a widely varying range of results, and that a choice of one of them was largely a matter of preference. The Commission's determination to use a "modified Btu" approach, whereby a Btu of natural gas is assumed to be "worth" only a selected fraction of a Btu of oil, is a policy choice having significant consequences for the industry. The same witness testified that switching from the Commission's assumption in its 1968 opinion that a Btu of oil is worth 3.5 times a Btu of natural gas to a 2.34 factor would make several cents' difference in the ceiling rates. *Id.*, at 550. An assumption of equality would thus appear likely to have a large impact. Yet no market price comparison of the values of oil and gas is available for the interstate market since the Commission sets the price of natural gas.

Moreover, another witness testified that, since natural gas competes with oil in many markets, producers of both harm themselves when they expand their production of natural gas under the restraint of price ceilings. *Id.*, at 476–481. Cf. n. 23, *supra*.

Rather, the Commission pointed out that the results of exploratory activity are by nature dependent to some extent on chance, and the level of exploratory activity in turn may be influenced by many other factors besides price, including, the Commission said, "monetary inflation, changes in real cost of input resources, availability of input resources, changes in alternative investment opportunities, development of new producing areas, size of prospective reservoirs, changes in business confidence, degree of directionality of exploratory effort [toward gas or oil], changes in industry technology, and other factors influencing business decisions." [52] We think the record sufficiently supports the Commission's conclusion:

> "Summarizing, there exists a positive relationship between gas contract price levels and exploratory effort; no reliable quantitative forecasts may be made by increments of additional gas supply resulting from specific increased gas prices; increases in ceiling prices which yield increases in producer revenues will result in expanded gas exploration activity; and the adequacy of expanded gas exploratory activity in terms of sufficiency of gas supply in relation to gas demands must be determined by continued Commission observation of the results of our decisions." 46 F. P. C., at 124.

New York's contention that the rates on flowing or first vintage gas are not supported by substantial evidence is also predicated on an erroneously limited view of the permissible range of the Commission's authority to employ price to encourage exploration or production. Reduced to simplest form, New York's contention is that the 1968 order set just and reasonable rates for first vintage gas, that no new evidence was introduced as to the

[52] 46 F. P. C., at 121.

cost of that gas, and that the 1971-order prices for that gas are consequently excessive. Again, as we said in *Permian,* the Commission is not so limited in its construction of rate formulae. Its justification here for increasing the price of flowing or first vintage gas was not that new evidence showed that the conditions of producing that gas differed from the conditions found in the 1968 opinion, but, as the Commission frankly acknowledged, new revenues were deemed necessary to expand future production. As between placing the burden of that expansion on new or second vintage gas alone or spreading it over both old and new gas, it judged the latter more equitable and more likely to lead to the immediately increased capital necessary in the face of a crisis. We see nothing in New York's argument to suggest that the Commission could not—in view of its finding that increased revenues were necessary—place the burden of those payments on all users rather than on those alone who purchased gas in the future. Indeed, it is worth noting that the Commission's rate orders in *Permian* included in the cost components of gas a noncost price element for future expansion of exploratory effort.[53]

In this situation, the Commission could reasonably choose its formula as an appropriate mechanism for protecting the public interest. And, against the background of a serious and growing domestic gas shortage, the Court

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[53] See *Permian Basin,* 390 U. S., at 815 n. 98. With the introduction of the formula used in this case, the Commission stated:

"*Adjustment for Exploration in Excess of Production.* This adjustment was designed, in prior cases, to continue to provide findings in excess of production. At the present time, findings of nonassociated gas are substantially less than production . . . . As we indicated in *Texas Gulf Coast,* our concept of economic costing includes the costs of eliciting the required exploratory and drilling effort. Thus, there is no reason to consider special allowance categories." 46 F. P. C., at 133.

of Appeals could certainly conclude that the Commission might reasonably decide that, as compared with adjustments in the rate ceilings for gas producers to induce more exploration and production, its responsibility to maintain adequate supplies at the lowest reasonable rate could better be discharged by means of the contingent escalation and refund credit provisions. We therefore agree with the Court of Appeals' holding that "these periodic escalations were a proper subject for the exercise of administrative discretion and clearly fall within that 'zone of reasonableness' which we allow FPC on review." 483 F. 2d, at 908.

B

Mobil, New York, and MDG all raise claims that even if the Commission's rates are sufficient to satisfy the Act's minimum requirements as to amount and, on the basis of the Commission's chosen methodology, are supported by substantial evidence, they are nonetheless unduly discriminatory and therefore unlawful under §§ 4 and 5 of the Act. This attack is directed both to the contingent escalations on flowing or first vintage gas and to the refund credits.

The background to Mobil's argument is a Commission program inaugurated after promulgation in 1960 of guidelines for area rate regulation. *Statement of General Policy No. 61–1,* 24 F. P. C. 818 (1960); *Fourth Amendment to Statement of General Policy No. 61–1,* 26 F. P. C. 661 (1961). That program was aimed at disposing of claims arising from rates that exceeded guideline levels. The program encouraged settlement of contested rate dockets and resulted in substantial producer refunds, reduction of producer rates to guideline levels, and moratoria on producer rate increases for substantial periods. Major producers like Mobil that cooperated with the program thus had little if any refund obligation to "work

off" among the $150 million refunds directed by the 1971 order, whereas producers who for over a decade had not cooperated with FPC but had continued collection of higher rates, had high refund liabilities, and thus enjoyed the benefits of the refund credit formula. Mobil contends undue discrimination results because these producers earn refund credits by dedicating new natural gas reserves which are not counted toward industry escalations, yet also receive all escalations in flowing gas ceiling rates earned by dedication of new natural gas reserves by other producers. Moreover, Mobil's argument continues, the refund credits provide the noncooperating producers with working capital they may use, for example, in competitive lease biddings and other corporate activities, while cooperating producers like Mobil are not allowed comparable allowances in the revenues to be realized from the area rates.

The Commission squarely faced up to the Mobil argument as follows, 46 F. P. C., at 109–110:

> "The substance of their argument is that the rate design in the settlement proposal unlawfully discriminates against producers who in the past cooperated with the Commission and consumer and distributor interests by executing companywide settlements, and made refunds which reduced their revenues to the general level of the Commission's Section 7 guideline level, and in favor of producers who did not enter into such rate settlements or otherwise reduce their contested Section 4 and Section 7 rates. The latter . . . in the meantime have collected rates considerably higher than those realized by the group which settled. Under the proposed settlement, as Mobil points out, one group is in effect rewarded for their relative intransigence—they will be able to retain revenues collected up to the agreed 22.375¢

(where their contracts permit) and achieve a favored revenue position.

. . . . .

"The logic of this [Mobil's] position cannot be assailed. Candor requires us to admit that some of the predicted inequities as among producers will surely occur, and those who have attempted to work 'within the system' are comparatively disadvantaged. We have chosen to go the route of the alternative rate design suggested in the [settlement] proposal. The inequitable consequences which might flow from it have to be compared with its advantages, and . . . no scheme can be free of some inequities. The broader acceptability of the [settlement] proposal with the distributor group impels us to act as we do."

In other words, it was the Commission's judgment that even though the refund credit device does not operate as favorably for producers who paid refunds and lowered rates, the advantages in the public interest that could result from encouraging exploration and increased production overrode such possible inequitable consequences. The Court of Appeals held that in thus striking the balance, the Commission acted within its statutory authority upon substantial evidence. The Court of Appeals stated, 483 F. 2d, at 905:

"FPC concluded that the overall structure would stimulate greater exploration and development and have a general pro-competitive effect. We will not reject an administrative decision merely because one producer's piece of cake is iced and another's is not. The crucial factor, in total alignment with both *Permian* and *SoLa I*, is that both get *some* cake. Given the wisdom of the administrative de-

> sire to elicit new supply, and accepting the proposition that the incalculable relationship between rate and supply is positive, we refuse to tamper with an overall program which effectively exploits that relationship. FPC's order setting the total refund obligation of all gas producers in [the Southern Louisiana area] is therefore fully sustained."

The question ultimately becomes whether this degree of discrimination in some of the provisions of the rate order renders the order unjust and unreasonable as a whole, despite its overall balance of effects and purposes. Obviously, some discrimination arises from the mere fact of area, rather than individual-producer, regulation, but *Permian* held such effects justified. Similarly, departure from cost basing in setting rates can, on Mobil's theory of the meaning of "discrimination," be said to be discriminatory, but *Permian* held that this too may be justified by other regulatory concerns. Here, although the impact on Mobil exists, the size of that impact will depend on the fortuity of other producers' success in future exploratory efforts, and, of course, the favorable terms of its settlement would have to be considered in mitigation of that impact.

We cannot say that the Court of Appeals misapprehended or grossly misapplied the substantial-evidence standard in concluding that the Commission's assessment of the need for the refund credits, compared to the costs and benefits of some other scheme, was adequately supported. Mobil voluntarily exercised a business judgment in deciding early in the course of the proceedings to compromise in advance refund liabilities that might be imposed upon it at the conclusion of the various rate proceedings. In a sense, therefore, the claimed discrimination arises solely from its voluntary decision. This was part of the Commission's answer to Mobil's con-

tention, 46 F. P. C., at 135, "Parties who enter into settlements or those who refuse to do so, always run the risk that the ultimate Commission determination may be higher or lower than the settlement levels." And the Court of Appeals pointed out, 483 F. 2d, at 906 n. 31: "If the [1971] rates were lower than those established in these agreements, the private settlements would have been worthwhile. As it turns out, FPC was more generous in [1971] than was anticipated. But this clearly furnishes no basis for attack." Moreover, it is a matter of speculation whether Mobil's gain from its settlement actually might be less advantageous than its hypothetical gains from refund credits.

New York and MDG argue that the refund credit formula is discriminatory against pipeline purchasers because it permits producers to work off refunds by offering 50%, rather than 100%, of the new reserves to pipeline purchasers other than those owed the refunds. It may suffice to answer that the pipeline purchasers affected make no complaint. In any event, since the purpose of the device is to increase supply, we cannot say that the Court of Appeals erred in holding that the provision was within Commission discretion. The record shows that two-thirds of the refund obligations are owed to three of the 14 pipeline companies serving the area.[54] The Commission could reasonably conclude that in guaranteeing that 50% of the new reserves must be offered to these three companies, their producers' incentive to explore for and produce new gas anywhere in the area, could result in their dedication of new reserves that would exceed in benefit the amount of the refunds.

It is also contended that, because the work-off provision of the order applies entirely to present producers, the

[54] See 5 App. 266e.

work-off provision "imperil[s] the entry of new producer entrants and [gives] a competitive advantage to producers who had charged the most unreasonable rates in the past." Brief for MDG 47. The 0.5¢ per Mcf incentive increases on flowing gas are attacked on the same ground. Brief for New York 37. The Court of Appeals, addressing this attack upon both the contingent escalation provisions and the refund work-offs, sufficiently answered these arguments:

> "And for that unnamed new market entrant, for whom much concern is expressed, we fail to see why he would be in the least bit dissuaded from committing new reserves at 26¢/Mcf by the fact that it might allow some of his competitors to raise their 22.375¢/Mcf flowing gas price by a half-penny." 483 F. 2d, at 908.

Finally, New York argues that some producers might abandon their normal business of exploring for and developing new reserves and yet enjoy the 0.5¢ per Mcf increase in their prices for flowing gas if other producers go ahead and contribute substantial additional reserves. We are not persuaded. The Commission's belief that producers already operating in the area will continue to do so is certainly at least an equally tenable judgment.

The Commission's purpose is to obtain increasing production of gas, and its targets are not so demonstrably unrelated as to justify acceptance of New York's fears that contingent escalations will have a negative effect on overall exploratory effort. In any event, other than the expressed fears, New York offered nothing to overcome the "presumption of validity [that] attaches to each exercise of the Commission's expertise. . . . [T]hose who would overturn the Commission's judgment undertake 'the heavy burden of making a convincing showing

that it is invalid because it is unjust and unreasonable in its consequences.' " *Permian Basin,* 390 U. S., at 767.

C

We come last in our consideration of the Commission's order to a series of more narrowly drawn objections raised by the various parties. Mobil objects to the Commission's fixing of moratoria on new rate filings—until October 1, 1976, for flowing or first vintage gas contracts, and until October 1, 1977, for new or second vintage gas contracts. It contends that those provisions are unsupported by required findings of fact and by substantial evidence. The Court of Appeals reached a contrary conclusion and we are not able to say that this conclusion misapprehended or grossly misapplied the substantial-evidence standard. We pointed out in *Permian Basin* that, unless raised as an attack on the viability of the entire order, such claims are, at best, premature. It is true, as Mobil argues, that the underlying conditions of stability justifying the moratorium in *Permian* have been found by the Commission to be no longer true. But the Commission has responsively shifted from reliance upon stable prices to reliance upon automatic escalations together with refund credits and contingent escalations. Even as to producers like Mobil that settled (for a yet-unknown financial benefit) their refund obligations, the contingent escalations and automatic escalations introduced for the purpose of both encouraging increased exploratory activity and covering inflation costs offer adequate assurances of keeping those producers above that line where a moratorium might run afoul of the minimum return required under the Act and the Constitution. See *Permian Basin, supra,* at 769–771.

In addition, as the Court of Appeals said:

"[T]here are several alternative methods by which

> a single aggrieved producer may establish higher rates as his circumstances warrant. . . . Thus, the system is so structured that FPC can retain industry and area wide rate stability for a period of at least five years while simultaneously protecting the financial integrity of the individual producer. And if the change in circumstances is so widespread that the area rate is no longer economically feasible as set, FPC has the power to lift its moratorium or establish new area rates, or both." 483 F. 2d, at 909.

Mobil also complains that the Commission failed to provide automatic adjustments in area rates to compensate for anticipated higher royalty costs. It relies on *Mobil Oil Corp.* v. *FPC*, 149 U. S. App. D. C. 310, 463 F. 2d 256 (1972), where the Court of Appeals for the District of Columbia Circuit reversed a Commission holding that subjected royalties to FPC administrative ceilings. Mobil argues that under that decision the 1971 rate schedules must take into account the possibility of higher royalty obligations. We agree with the Court of Appeals that Mobil's argument is hypothetical at this stage and that in any event an affected producer is entitled to seek individualized relief. The Court of Appeals said:

> "[W]e are not willing to alter or stay the implementation of area wide rates for the entire industry merely on the basis of what *might* happen to *some* producers' costs *if* [the District of Columbia Circuit's] statement of the law prevails.
>
> "If, as subsequent events develop, the producers are put in a bind by their royalty obligations, they may certainly petition FPC for individualized relief. *Permian* contemplated it." 483 F. 2d, at 911 (emphasis in original).

New York objects to the Commission's elimination of

the distinction in maximum permissible rates between casinghead gas and gas-well gas so far as new dedications are concerned. Casinghead gas has traditionally been treated as a byproduct of oil and therefore costed and priced lower than gas-well gas. The Court of Appeals held that "FPC acted within the bounds of administrative propriety in abandoning any such distinction." *Id.*, at 910. We cannot say that this conclusion, supported by the following reasoning, was error:

> "We believe that several considerations support this course of action: (i) 'the exigencies of administration demand the smallest possible number of separate area rates,' *Permian, supra,* 390 U. S. at 761, . . . (ii) there is a serious problem of allocating the proper amount of exploration and development expenses between oil and gas, see *SoLa I:* 428 F. 2d 422 n. 30, (iii) imposing a lower price on casinghead gas might ' "invite the divergence of such gas to the intrastate market," ' Op: 598, ¶ 167, and (iv) making the production of casinghead gas economically unfeasible might encourage profit-minded producers to flare it rather than market it—thus making natural gas in [the Southern Louisiana area] not merely a wast*ing* but a wast*ed,* asset. . . ." 483 F. 2d, at 909 (emphasis in original).[55]

Such pragmatic adjustments were used in *Permian Basin* as a way of equating first vintage gas and all casinghead gas, new and old. All that the Commission has done

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[55] In its opinion on rehearing the Commission stated, 46 F. P. C., at 636–637:

"We note, again, that the Btu content of casinghead and gas-well gas is about the same, and the record shows that substantial volumes of casinghead gas are being flared in Southern Louisiana—reason in itself for eliminating the price discrimination."

here is to equate all new casinghead gas with all new gas just as old casinghead gas has always been equated with old gas-well gas.

Mobil complains of the provision of the order that established minimum rates to be paid by producers to pipelines for transportation of liquids and liquefiable hydrocarbons. Mobil argues that these minimum rates are not supported by substantial evidence. The Court of Appeals disagreed. "We have examined the testimony regarding this matter and conclude that FPC had a substantial evidentiary basis from which it could conclude that the particular rates which it established should supply a reasonable floor on these charges. This answers Mobil's objection." *Id.*, at 911. Mobil has not met its burden of demonstrating that the Court of Appeals misapprehended or grossly misapplied the substantial-evidence standard.

V

The overriding objective of the Commission was, as the Court of Appeals observed, to adopt "a total rate structure to motivate private producers to fully develop [the Southern Louisiana area's] resources." *Id.*, at 891. The Commission's findings, 46 F. P. C., at 102, emphasize that goal:

> "Our duty is to take all the action we believe necessary to reverse a downtrend of the exploration and development effort, thereby to increase the likelihood of augmenting the national inventory of proved reserves of natural gas. We would be derelict—we can think of no softer word—if we were to be guided by the legalisms of the past in seeking solutions to the problems which have grown like

barnacles as this case has aged and its size has mounted."

Features of the 1971 order designed to increase supplies of natural gas may strike some as novel but we have emphasized that the Commission "must be free . . . to devise methods of regulation capable of equitably reconciling diverse and conflicting interests." *Permian,* 390 U. S., at 767. That principle has obvious applicability in this time of acute energy shortage. This accents the observation, apparently still the case, that "area regulation of producer prices is avowedly still experimental in its terms and uncertain in its ultimate consequences." *Id.,* at 772. For, as the Court of Appeals said:

> "Cast in the perspective of the human travail, some might say that the dozen year experience with area rate regulation should arguably justify a holding that the experimental phase has passed. In 1971, . . . however, FPC had only twice been the beneficiary of the judicial function to declare 'what the law is'. No one can honestly say that judges have been any more sure than commissioners, as all struggle with a problem that grows out of the peculiar mixture of a simultaneous service and exhaustion of a depletable asset. All have been groping. The day for groping is not yet over. And it does not denigrate what FPC has done to say that much may yet be imperfect and much remains to be done or redone. So we can find that FPC has conscientiously attempted to establish 'just and reasonable' rates within the framework allowed by judicial precedent, yet, it is still experimenting." 483 F. 2d, at 889.

We cannot now hold that, in these circumstances, the Court of Appeals erred in deciding that the Commission's

1971 order was an appropriate exercise of administrative discretion supported by substantial evidence.

Affirmed.

MR. JUSTICE STEWART and MR. JUSTICE POWELL took no part in the consideration or decision of these cases.

DAVIS *v.* UNITED STATES

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 72–1454. Argued February 26, 1974—Decided June 10, 1974

After being declared a delinquent, petitioner was ordered to report for induction pursuant to Selective Service regulations, which permitted the ordering of a declared delinquent to report for induction even though he had not been found acceptable for military service. When petitioner did not report as ordered, he was prosecuted and convicted for failure to report for induction. Following a remand by the Court of Appeals for reconsideration in the light of the intervening decision of this Court in *Gutknecht* v. *United States*, 396 U. S. 295, the District Court concluded that *Gutknecht* did not affect the conviction, and the Court of Appeals affirmed. While petitioner's petition for certiorari was pending in this Court, the Court of Appeals decided *United States* v. *Fox*, 454 F. 2d 593, wherein, on the authority of *Gutknecht*, that court reversed a conviction based on facts virtually identical to those on which petitioner's conviction was based. This Court subsequently denied certiorari in the petitioner's case. After beginning his sentence, petitioner brought this collateral proceeding under 28 U. S. C. § 2255, asserting that the Court of Appeals in the *Fox* case had effected a change in the law of the Ninth Circuit after affirmance of his conviction and that the holding in *Fox* required that his conviction be set aside. The District Court summarily denied relief. The Court of Appeals affirmed on the ground that because petitioner had unsuccessfully litigated the *Gutknecht* issue on direct review, the court's earlier affirmance was "the law of the case" and precluded petitioner from securing relief under § 2255 on the basis of an intervening change in law. *Held:*

1. Even though the legal issue raised in a prior direct appeal from petitioner's conviction was determined against petitioner, he is not precluded from raising the issue in a § 2255 proceeding "if new law has been made . . . since the trial and appeal." *Kaufman* v. *United States*, 394 U. S. 217, 230. Pp. 341–342.

2. The fact that petitioner's claim is grounded "in the laws of the United States" rather than in the Constitution does not

preclude its assertion in a § 2255 proceeding, particularly since § 2255 permits a federal prisoner to assert a claim that his confinement is "in violation of the Constitution *or laws* of the United States." *Sunal* v. *Large*, 332 U. S. 174, distinguished. Pp. 342–346.

3. The issue that petitioner raises is cognizable in a § 2255 proceeding. Pp. 346–347.

472 F. 2d 596, reversed and remanded.

STEWART, J., delivered the opinion of the Court, in which BURGER, C. J., and DOUGLAS, BRENNAN, WHITE, MARSHALL, and BLACKMUN, JJ., joined. POWELL, J., filed an opinion concurring in part and dissenting in part, *post*, p. 347. REHNQUIST, J., filed a dissenting opinion, *post*, p. 350.

Marvin M. Karpatkin argued the cause for petitioner. With him on the briefs was *Melvin L. Wulf*.

Edmund W. Kitch argued the cause for the United States. With him on the brief were *Solicitor General Bork, Assistant Attorney General Petersen, Deputy Solicitor General Frey, Jerome M. Feit*, and *Frederick W. Read III*.

MR. JUSTICE STEWART delivered the opinion of the Court.

This case involves the availability of collateral relief from a federal criminal conviction based upon an intervening change in substantive law. While the question presented is a relatively narrow one, it arises as the result of a rather complicated chain of events.

I

In February 1965, the petitioner, Joseph Anthony Davis, was classified I–A by his draft board and ordered to report for a pre-induction physical examination. Davis failed to appear on the appointed date. He later informed his local board that his failure to report was due to illness. Although the board attempted to arrange

a second date for the pre-induction physical, its attempts to communicate with the petitioner were frustrated by his failure to keep the board apprised of his correct mailing addresses. As a result, the local board's communications to the petitioner were returned to the board stamped "addressee unknown," and Davis again failed to report for the physical. In December 1965, the board sent the petitioner a warning that it was considering declaring him a delinquent because of his failure to report for the second pre-induction physical.[1] This communication was also returned to the board stamped "addressee unknown."

After another unsuccessful attempt to communicate with the petitioner, the local board declared him a delinquent, pursuant to 32 CFR § 1642.4 (a) (1967),[2] both because of his failure to report for the second pre-induction physical and because of his failure to keep the local board informed of his current address.[3] At the

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[1] The notice further stated that "[a] delinquent registrant loses his eligibility for deferment and may be placed in a class immediately available for service. He is ordered for induction ahead of other registrants." Pet. for Cert. 21a.

[2] This regulation, which was rescinded shortly after our decision in *Gutknecht* v. *United States,* 396 U. S. 295 (1970), provided in pertinent part:

"(a) Whenever a registrant has failed to perform any duty or duties required of him under the selective service law other than the duty to comply with an Order to Report for Induction . . . or the duty to comply with an Order to Report for Civilian Work . . . , the local board may declare him to be a delinquent."

[3] Title 32 CFR § 1641.4 imposes a duty on every registrant to report for an Armed Forces physical examination at the time and place fixed in the order mailed to the registrant by the board. Title 32 CFR § 1641.1 imposes a duty on every registrant "to keep his local board currently informed in writing of . . . the address where mail will reach him . . . ."

same time the board mailed the petitioner a delinquency notice. Shortly after the delinquency declaration, the board sent the petitioner an order directing him to report for induction into the Armed Forces. Once again, the order was returned to the board stamped "addressee unknown." Several months later, the board sent the petitioner a second order to report for induction. This time the order was mailed to a St. Paul, Minnesota, address that Davis had used when requesting a duplicate draft card. Although there was no indication that Davis did not receive the induction order, he once again failed to report as ordered. This second failure to report for induction resulted in the petitioner's prosecution and conviction under 50 U. S. C. App. § 462 (a).[4]

At the time that the local board issued the second induction order, 32 CFR § 1631.7 (a) (1967) provided that registrants could be ordered to report for induction only after they "[had] been found acceptable for service in the Armed Forces and . . . the local board [had] mailed [them] a Statement of Acceptability . . . at least 21 days before the date fixed for induction." Since, at the time of his induction order, Davis had not yet appeared for a physical examination to determine his acceptability, quite obviously neither one of these requirements was satisfied. The regulation, however, went on to provide that "a registrant classified in

[4] Title 50 U. S. C. App. § 462 (a) provides, in pertinent part, that "any person . . . who in any manner shall knowingly fail or neglect or refuse to perform any duty required of him under or in the execution of this title, or rules, regulations, or directions made pursuant to this title . . . shall, upon conviction in any district court of the United States of competent jurisdiction, be punished by imprisonment for not more than five years or a fine of not more than $10,000, or by both such fine and imprisonment." Title 32 CFR § 1641.5 imposes a duty on every registrant "to report for induction at the time and place ordered by the local board."

Class I–A or Class I–A–O who is a delinquent may be selected and ordered to report for induction to fill an induction call notwithstanding the fact that he has not been found acceptable for service in the Armed Forces and has not been mailed a Statement of Acceptability . . . ." The only other registrants similarly excepted from these prerequisites were those who had volunteered for induction. In light of this proviso, the local board evidently concluded that the preconditions to induction stated in § 1631.7 (a) were inapplicable to the petitioner, whom it had earlier declared to be a delinquent, and that it was thus free to issue an induction order to the petitioner.[5]

Davis appealed his conviction to the Court of Appeals for the Ninth Circuit. While that appeal was pending, this Court announced its decision in *Gutknecht* v. *United States*, 396 U. S. 295 (1970). In *Gutknecht* a Selective Service registrant's induction had been accelerated because his local board had declared him a delinquent.[6] When he failed to report for induction as ordered, he was prosecuted and convicted under 50 U. S. C. App. § 462. The delinquent registrant's accelerated induction was ordered in accordance with another portion of 32

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[5] Both induction orders sent to the petitioner had the word "Delinquent" typed on the face. The local board's "Minutes of Action" also reflect that the petitioner was ordered to report "as Del."

[6] Title 32 CFR § 1631.7 (1967) established an order in which registrants who were eligible would be called for induction. A registrant's place in this order of call was determined by several factors, including age and marital status. If a registrant were declared a delinquent under 32 CFR § 1642.4 (1967), he immediately entered the first priority in the order of call and was ordered to report for induction even ahead of volunteers for induction. In this sense, the registrant's induction was "accelerated" as a result of the local board's delinquency declaration.

CFR § 1631.7 (a) that, like the provision applicable to Davis, called for exceptional treatment for registrants whom a local board had declared delinquent. Local boards were authorized by 32 CFR § 1642.4 to issue a declaration of delinquency "[w]henever a registrant . . . failed to perform any duty or duties required of him under the selective service law," other than to report as ordered for induction or for civilian work. Both Davis and Gutknecht were declared delinquent on the authority of § 1642.4.[7] In *Gutknecht*, the Court held that the Selective Service regulations that accelerated the induction of delinquent registrants by shifting them to the first priority in the order of call were punitive in nature and, as such, were without legislative sanction.[8] Accordingly, the Court concluded that the registrant could not be prosecuted for failure to comply with an induction order issued pursuant to these regulations.

After *Gutknecht*, the Court of Appeals remanded the petitioner's case to the District Court "without limitation of scope but especially for consideration . . . in the light of the intervening decision of *Gutknecht* v. *United States*." 432 F. 2d 1009, 1010 (1970). On remand,

[7] Gutknecht had been declared a delinquent for failing to have his registration certificate and current classification notice in his possession at all times, as required by 32 CFR §§ 1617.1 and 1623.5, respectively.

[8] In this regard, the Court said:

"The power under the regulations to declare a registrant 'delinquent' has no statutory standard or even guidelines. The power is exercised entirely at the discretion of the local board. It is a broad, roving authority, a type of administrative absolutism not congenial to our law-making traditions. . . . We search the Act in vain for any clues that Congress desired the Act to have punitive sanctions apart from the criminal prosecutions specifically authorized . . . . If federal or state laws are violated by registrants, they can be prosecuted. If induction is to be substituted for these prosecutions, a vast rewriting of the Act is needed." 396 U. S., at 306–307.

the District Court, after conducting a hearing, concluded that the petitioner's induction had not been accelerated because of his delinquency status and that *Gutknecht* therefore did not affect his conviction.[9] On appeal, the Court of Appeals affirmed. 447 F. 2d 1376.

While Davis' subsequent petition for certiorari was pending in this Court, the Court of Appeals for the Ninth Circuit decided *United States* v. *Fox*, 454 F. 2d 593. The circumstances leading to Fox's induction order were virtually identical to those in the petitioner's case. Like Davis, "Fox was declared delinquent by his Selective Service Board . . . for his failure to appear for pre-induction physical examinations as ordered . . . ." *Ibid.* Prior to receiving his induction order, "Fox . . . was never found to be 'acceptable for service' and he was [not] mailed a Statement of Acceptability . . . at least 21 days before his induction date . . . ." "[T]hus the only authority the Local Board had for its order to Fox to report for induction was the provision of § 1631.7 (b)[10] for delinquents to be called without a previous finding of acceptability or the mailing of a Statement of Acceptability 21 days before induction." *Id.*, at 595.

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[9] At the hearing in the District Court, the executive secretary of the local board testified that the petitioner would have been inducted earlier if he had not failed to appear for the physical. In corroboration, the Government introduced the local board's "delivery lists" showing the induction dates of other registrants at the local board. The District Court found that if the petitioner had complied with the local board's procedures and "[h]ad . . . not been declared a Delinquent, he would have been ordered to report for induction on or before November 15, 1966," which would have been nearly eight months before he finally failed to report (July 11, 1967).

[10] Between the dates of the induction orders of Davis and Fox, the provisions of 32 CFR § 1631.7 (a) (1967) were incorporated into 32 CFR § 1631.7 (b) (1969).

This was the same regulation on which the board's induction order to Davis had been predicated.

At Fox's post-*Gutknecht* trial for failure to report for induction, "the government offered evidence . . . to show that Fox's induction order was not accelerated by the declaration of delinquency." "The trial judge found no acceleration and convicted." *Id.*, at 593–594. The Court of Appeals reversed Fox's conviction on the authority of *Gutknecht*. The court held that "Fox's induction was accelerated by the declaration of delinquency as a matter of law [because] [w]ithout the declaration, the Board could not have ordered him to report for induction." *Id.*, at 594. Thus, the court concluded "that the [induction] order . . . was illegal and created no duty on Fox's part to report for induction." *Id.*, at 595.

In opposing Davis' petition for certiorari, the Solicitor General conceded that "the holdings in *Fox* and in [*Davis*] are inconsistent," but nevertheless urged the Court to deny certiorari in that "the conflict is an intra-circuit one . . . [to] be resolved by the Ninth Circuit itself . . . ." Supplemental Memorandum for the United States in Opposition 2 (No. 71–661, O. T. 1971). We denied Davis' petition for certiorari. 405 U. S. 933.

After an unsuccessful attempt to secure a rehearing in the Court of Appeals, Davis was remitted to federal custody to commence serving his three-year sentence. He then instituted the present collateral proceeding under 28 U. S. C. § 2255, which permits "[a] prisoner in custody under sentence of a court established by Act of Congress claiming the right to be released upon the ground that the sentence was imposed in violation of the Constitution or laws of the United States . . . [to] move the court which imposed the sentence to vacate, set aside or correct the sentence." In his § 2255 motion,

Davis asserted that the Court of Appeals for the Ninth Circuit had in the *Fox* case effected a change in the law of that Circuit after the affirmance of his conviction, and that its holding in *Fox* required his conviction to be set aside. The District Court summarily denied the petitioner's motion.[11] On appeal, the Court of Appeals affirmed without considering the merits of the petitioner's claim on the ground that "[t]he decision on the direct appeal is the law of the case," and that therefore any "new law, or change in law" resulting from its decision in *United States* v. *Fox* would "not [be] applied in this circuit under circumstances such as here presented." 472 F. 2d 596. Because the case presents a seemingly important question concerning the extent to which relief under 28 U. S. C. § 2255 is available by reason of an intervening change in law, we granted certiorari. 414 U. S. 999.

II

The sole issue before the Court in the present posture of this case is the propriety of the Court of Appeals' judgment that a change in the law of that Circuit after the petitioner's conviction may not be successfully asserted by him in a § 2255 proceeding.[12] Thus, our inquiry is confined to the availability of a § 2255 proceeding for

[11] At the time of his § 2255 motion in the District Court, Davis also moved under Fed. Rule Crim. Proc. 35 for reduction or modification of his sentence. This motion was taken under advisement by the District Court and was thereafter granted in part. As a result, the petitioner was released from incarceration after having served four months of his three-year sentence, and he was placed on probation for the remainder of the original term.

[12] In the absence of a decision by the Court of Appeals on the merits of the petitioner's contentions, this case is not an appropriate vehicle to consider whether the *Gutknecht* decision has retroactive application or whether the *Fox* case was correctly decided by the Court of Appeals.

the resolution of Davis' claim to relief from his conviction.

Because the petitioner had unsuccessfully litigated the *Gutknecht* issue on direct review, the Court of Appeals held that its earlier affirmance was "the law of the case" and precluded the petitioner from asserting on collateral attack his claim that its *Fox* decision had subsequently changed the law of the Ninth Circuit on that issue. In this Court, the Solicitor General's brief concedes that the opinion of the Court of Appeals in this regard "is not consonant with this Court's holding in *Sanders* v. *United States*, 373 U. S. 1." [13] In *Sanders*, the Court held, *inter alia*, that even though the legal issue raised in a § 2255 motion "was determined against [the applicant] on the merits on a prior application," "the applicant may [nevertheless] be entitled to a new hearing upon showing an intervening change in the law . . . ." *Sanders* v. *United States*, 373 U. S. 1, 17. The same rule applies when the prior determination was made on direct appeal from the applicant's conviction, instead of in an earlier § 2255 proceeding, "if new law has been made . . . since the trial and appeal." *Kaufman* v. *United States*, 394 U. S. 217, 230 (1969). Thus, the Court of Appeals erred in holding that "the law of the case," as determined in the earlier appeal from the petitioner's conviction, precluded him from securing relief under § 2255 on the basis of an intervening change in law.

Nevertheless, the Solicitor General contends that we should affirm the judgment of the Court of Appeals because the petitioner's claim is not "of constitutional dimension" (Brief for United States 34) and thus is not cognizable in a § 2255 collateral proceeding. At the outset, we note that the Government's position finds scant support in the text of § 2255, which permits a federal prisoner to assert a claim that his confinement is "in

[13] Brief for United States 25 n. 11.

violation of the Constitution *or laws* of the United States." (Emphasis added.)

It is argued forcefully in a dissenting opinion today that this language, which appears in the first paragraph of § 2255, is somehow qualified by the third paragraph of the statute, which provides:

> "If the court finds that the judgment was rendered without jurisdiction, or that the sentence imposed was not authorized by law or otherwise open to collateral attack, or that there has been such a denial or infringement of the constitutional rights of the prisoner as to render the judgment vulnerable to collateral attack, the court shall vacate and set the judgment aside and shall discharge the prisoner or resentence him or grant a new trial or correct the sentence as may appear appropriate."

The dissent of MR. JUSTICE REHNQUIST rejects any suggestion that the language concerning "sentence[s] . . . otherwise open to collateral attack" can encompass a claim that a confinement under that sentence violates the "laws of the United States," contending that this would reduce the remaining language regarding "a denial or infringement of constitutional rights" to surplusage. Indeed, the nub of the dissent is that § 2255 "does not speak of an illegal '*confinement*' . . . or even of an illegal *conviction*, but rather of illegal *sentences*." *Post*, at 356. (Emphasis in original.) Although this microscopic analysis of § 2255 surely shows that the statutory language is somewhat lacking in precision, the resulting shadow that the dissenting opinion would cast over the statute totally disappears in the light of its legislative history.

That history makes clear that § 2255 was intended to afford federal prisoners a remedy identical in scope to federal habeas corpus. As the Court pointed out in *United States* v. *Hayman*, 342 U. S. 205, 219 (1952), the "history

of Section 2255 shows that it was passed at the instance of the Judicial Conference to meet practical difficulties that had arisen in administering the habeas corpus jurisdiction of the federal courts. Nowhere in the history of Section 2255 do we find any purpose to impinge upon prisoners' rights of collateral attack upon their convictions. On the contrary, the sole purpose was to minimize the difficulties encountered in habeas corpus hearings by affording the same rights in another and more convenient forum." Thus, there can be no doubt that the grounds for relief under § 2255 are equivalent to those encompassed by § 2254, the general federal habeas corpus statute, under which relief is available on the ground that "[a person] is in custody in violation of the Constitution *or laws* or treaties of the United States." (Emphasis added.) Furthermore, although the dissent of MR. JUSTICE REHNQUIST derides the view that the words "otherwise open to collateral attack" are intended to be "a catch-all phrase," *post*, at 358, the legislative history fully supports that view. In recommending to Congress what eventually became § 2255, the Judicial Conference Committee on Habeas Corpus Procedure stated that "[t]he motion remedy broadly covers all situations where the sentence is 'open to collateral attack.' As a remedy, it is intended to be as broad as habeas corpus." [14]

No microscopic reading of § 2255 can escape either the clear and simple language of § 2254 authorizing habeas corpus relief "on the ground that [the prisoner] is in custody in violation of the . . . laws . . . of the United States" or the unambiguous legislative history showing that § 2255 was intended to mirror § 2254 in operative effect. Thus, we cannot agree that the third paragraph of § 2255 was in any fashion designed to mark a retreat from the clear statement that § 2255 encompasses a pris-

[14] *United States* v. *Hayman*, 342 U. S. 205, 217 (1952).

oner's claim of "the right to be released upon the ground that the sentence was imposed in violation of the Constitution *or laws* of the United States." Accordingly, we conclude that the text of the statute cannot sustain the Government's position that only claims "of constitutional dimension" are cognizable under § 2255.

Moreover, there is no support in the prior holdings of this Court for the proposition that a claim is not cognizable under § 2255 merely because it is grounded in the "laws of the United States" rather than the Constitution. It is true, of course, that in *Sunal* v. *Large*, 332 U. S. 174 (1947), the Court held that the nonconstitutional claim in that case could not be asserted to set aside a conviction on collateral attack. But *Sunal* was merely an example of "the general rule . . . that the writ of *habeas corpus* will not be allowed to do service for an appeal." *Id.*, at 178. "Appeals could have been taken in these cases, but they were not." *Id.*, at 177. The Court was careful to point out that "if Sunal and Kulick had pursued the appellate course and failed, their cases would be quite different. But since they chose not to pursue the remedy which they had, we do not think they should now be allowed to justify their failure by saying they deemed any appeal futile." *Id.*, at 181. Moreover, "[t]he case [was] not one where the law was changed after the time for appeal had expired." *Ibid.* Thus, *Sunal* cannot be read to stand for the broad proposition that nonconstitutional claims can never be asserted in collateral attacks upon criminal convictions.[15] Rather,

[15] Although *Sunal* held that a federal prisoner could not assert a nonconstitutional claim on collateral attack if he had not raised it on appeal, the Court there recognized that this rule would not bar the assertion of *constitutional* claims in collateral proceedings even if the applicant had failed to pursue them on appeal. 332 U. S. 174, 178–179, 182. Cf. *Kaufman* v. *United States*, 394 U. S. 217, 223 (1969).

the implication would seem to be that, absent the particular considerations regarded as dispositive in that case, the fact that a contention is grounded not in the Constitution, but in the "laws of the United States" would not preclude its assertion in a § 2255 proceeding.

This is not to say, however, that every asserted error of law can be raised on a § 2255 motion. In *Hill* v. *United States*, 368 U. S. 424, 429 (1962), for example, we held that "collateral relief is not available when all that is shown is a failure to comply with the formal requirements" of a rule of criminal procedure in the absence of any indication that the defendant was prejudiced by the asserted technical error. We suggested that the appropriate inquiry was whether the claimed error of law was "a fundamental defect which inherently results in a complete miscarriage of justice," and whether "[i]t . . . present[s] exceptional circumstances where the need for the remedy afforded by the writ of *habeas corpus* is apparent." *Id.*, at 428 (internal quotation marks omitted). The Court did not suggest that any line could be drawn on the basis of whether the claim had its source in the Constitution or in the "laws of the United States."

In this case, the petitioner's contention is that the decision in *Gutknecht* v. *United States*, as interpreted and applied by the Court of Appeals for the Ninth Circuit in the *Fox* case after his conviction was affirmed, establishes that his induction order was invalid under the Selective Service Act and that he could not be lawfully convicted for failure to comply with that order. If this contention is well taken, then Davis' conviction and punishment are for an act that the law does not make criminal. There can be no room for doubt that such a circumstance "inherently results in a complete miscarriage of justice" and "present[s] exceptional cir-

cumstances" that justify collateral relief under § 2255. Therefore, although we express no view on the merits of the petitioner's claim, we hold that the issue he raises is cognizable in a § 2255 proceeding.

The judgment of the Court of Appeals is accordingly reversed and the case is remanded for further proceedings consistent with this opinion.

It is so ordered.

MR. JUSTICE POWELL, concurring in part and dissenting in part.

I agree with the Court's holding that review under 28 U. S. C. § 2255 is available to petitioner, due to the intervening change in the law of the Circuit. But I would dispose of the case finally, not remand it.

Petitioner's case turns on whether his conviction for refusing induction has been invalidated by *Gutknecht* v. *United States,* 396 U. S. 295 (1970). Both parties have raised, briefed and argued this issue, and it is properly before us. We should, in the interest of judicial economy if for no other reason, decide the *Gutknecht* issue and bring to an end this lengthy litigation, rather than remand it to the Court of Appeals for that court's fourth round of consideration.

In my view, petitioner's reliance upon *Gutknecht* is misplaced. Petitioner reads *Gutknecht* as invalidating the former delinquency regulations of the Selective Service System in every possible application.[1] He espouses a *per se* rule under which any induction order that derived from an application of those delinquency regulations is illegal. *Gutknecht* does not have such a broad sweep.

[1] *Gutknecht* concerned primarily 32 CFR § 1642.13 (1969), now superseded, which assigned first priority in the order of induction to delinquents. That regulation is not at issue here.

In *Gutknecht*, the registrant was declared a delinquent for failing to retain his registration and classification papers in his possession at all times. He had surrendered these papers in an act of protest against the Vietnam conflict. As a consequence of the delinquency declaration, he was rushed—indeed it might be said railroaded—to induction. The entire process lasted less than two months, and Gutknecht was issued an induction order on the day after Christmas, only six days after he had been declared a delinquent. He was deprived of his standing in the order of call and was truly "accelerated" in that he was ordered to induction prior to the date on which he would have been called if treated in the normal manner. Gutknecht, in essence, was caught up in the tide of punitive actions by the Selective Service System in the late 1960's against those who were thought to be evading military service because of opposition to the Vietnam conflict.

The Court's opinion in *Gutknecht* repeatedly refers to this deliberately punitive attitude of the Service and its use of the then prevailing delinquency regulations as a means, short of criminal prosecution, for dealing with such persons. See, *e. g.*, 396 U. S., at 306–308. But I do not read *Gutknecht* as overturning the former delinquency regulations in all circumstances, or as depriving boards of a reasonable and effective alternative procedure for dealing with recalcitrant registrants who plainly were seeking to avoid military service. If the stated rationale of the holding in *Gutknecht* is accepted, that case invalidated those regulations only insofar as they were applied punitively to advance the date of a registrant's induction or to deprive him of procedural rights that he had not waived. See *United States* v. *Dobie*, 444 F. 2d 417 (CA4 1971). The reasons relied upon by the Court in *Gutknecht* and in the concurring opinion

of MR. JUSTICE STEWART, 396 U. S., at 314, are incompatible with a *per se* rule proscribing all board authority to order an evasive registrant to report for induction. Thus, in my view *United States* v. *Fox,* 454 F. 2d 593 (CA9 1971), on which Davis relies, was incorrectly decided.

In the instant case it is undisputed that Davis was not, as a result of being declared delinquent, ordered to report for induction at a point in time prior to the normal order of his call. Indeed, due to the board's patient efforts to deal with Davis' repeated attempts to obstruct the induction process, Davis was ordered to report for induction some seven months later than would have been the case if the process had been allowed to function normally. There is no hint of vindictiveness or of an attempt to punish Davis.

The only impact on Davis of being declared delinquent, other than a *delay* in the issuance of an order to report for induction, was that the declaration of delinquency permitted the board under then prevailing regulations to issue an induction order in the absence of a pre-induction physical examination and of the resulting form letter notifying Davis of his acceptability for service.[2] Davis attempts to portray these preconditions

[2] Under 32 CFR § 1631.7 (1967), which has been withdrawn, the board could issue induction orders to those classified I–A or I–A–O who had been (i) found acceptable for service and (ii) mailed a Statement of Acceptability at least 21 days before the date fixed for induction, provided:

"That a registrant classified in Class I–A or Class I–A–O who is a delinquent may be selected and ordered to report for induction . . . notwithstanding the fact that he has not been found acceptable for service . . . and has not been mailed a Statement of Acceptability . . . ."

Davis received his induction notice under this regulation. Davis maintains that *Gutknecht* invalidated the above proviso clause, thus depriving the board of the power to induct him in the absence of

on induction as significant procedural rights of which he was unfairly deprived by the board. The argument is frivolous. Davis frustrated every effort of the board over a period of more than two years to accord him the right to a physical examination. Thus he waived the procedural rights on which he now seeks to rely. Moreover, he would have received such an examination in any event if he had reported for induction. And the form notifying a registrant of acceptability for service is hardly a matter of major moment, particularly to one who had long been on notice of the pendency of an induction order.

On the record in this case, no one could seriously contend that Davis was the victim of punitive action or that he was not treated with tolerance and forbearance. In my view, the Court in *Gutknecht* could hardly have intended to invalidate an induction order in such circumstances.

I would affirm the judgment.

MR. JUSTICE REHNQUIST, dissenting.

The Court today holds, with a minimum of discussion, that petitioner, in a proceeding under 28 U. S. C. § 2255, may raise his claim that his induction into the Armed Forces was accelerated contrary to the principles of *Gutknecht* v. *United States*, 396 U. S. 295 (1970). The Court reaches this result despite the fact that a United States District Court and the Court of Appeals for the Ninth Circuit previously considered this contention in light of *Gutknecht* and concluded that petitioner's in-

a finding of acceptability (*i. e.*, a pre-induction physical) and a Statement of Acceptability. But, as noted, *Gutknecht* dealt with punitive treatment of delinquents, not all treatment of such registrants. Moreover, the above regulation was not at issue in *Gutknecht*.

duction had not in fact been accelerated. As a justification for the decision this Court suggests that a § 2255 motion is both permissible and appropriate because a panel of the Court of Appeals for the Ninth Circuit has rendered a subsequent decision which adopts a new legal test for determining whether acceleration has occurred and which, if applied to petitioner, would probably change the outcome of his case. Since I believe the Court's decision is justified neither by the language of § 2255 itself nor by any prior case decided by this Court, and since I believe the potential consequences of the decision are harmful to the administration of justice, I dissent.

I

The Court's conclusion, discussed *infra*, that claims such as petitioner's can be raised on a § 2255 motion, is actually unnecessary for the disposition of this case. The decisions of the District Court and the Court of Appeals rested entirely on application of a "law of the case" theory, a position that the Government now disavows and that the Court disposes of in a single paragraph. The petitioner in his petition for certiorari and in his brief on the merits principally addressed that issue and his sole rebuttal of the Government's contention that nonconstitutional attacks on judgments of conviction are not cognizable in § 2255 proceedings is contained in his reply brief where he devotes one paragraph to arguing that his claim *is constitutional*. Thus the Court reaches out to decide a highly important issue without the benefit of lower court attention to the question, without full briefing and, in my view, without full examination of the issues involved. It would seem preferable to remand this case, as the Court does anyway, without deciding this issue, allowing further consideration of the question below and leaving our venture into this area for a more appropriate

occasion. Since the Court declines to do so, however, I will also address the broader question to which the Court proceeds.

II

The facts of this case are set out in detail in the Court's opinion. I review them here briefly only to emphasize the extent of both administrative and judicial consideration which petitioner has received. A mere recounting of the facts dispels the notion that there are any equities whatever in support of petitioner's claim for relief.

Petitioner's difficulties with the Selective Service System began in February of 1965 when he was classified I–A by his local draft board. At that time he was ordered to report for a pre-induction physical examination, but did not appear on the specified date. The board then attempted to schedule another physical but was frustrated by petitioner's failure to advise the board of his whereabouts. At this point the board warned petitioner that he was in danger of being declared a delinquent, but this warning was also returned with the notation "addressee unknown."

The board made one more unsuccessful attempt to communicate with petitioner and then declared him a delinquent according to the regulations then in effect.[1] After a brief interval the board then mailed petitioner, not a third notice to report for a physical examination, but rather a notice to report for induction. This order having been returned stamped "addressee unknown," the board followed up by sending petitioner a second notice to report for induction which he apparently received. He did not report, however, and was then prosecuted for this refusal.

[1] The particular regulation relied upon by the board was 32 CFR § 1642.4 (a) (1967), which was rescinded after the Court's decision in *Gutknecht* v. *United States*, 396 U. S. 295 (1970).

All parties to this case concede that Selective Service registrants who are not declared delinquents are not mailed orders of induction before they have taken a physical examination. Without the delinquency classification, which allowed the board to issue an induction order without having given a physical examination, the board would have been faced with one of two alternatives. It could have prosecuted the petitioner for failure to take the physical examination or, alternatively, it could have continued the obviously futile mailing of additional notices concerning the physical. The delinquency procedure enabled the board to bypass those two undesirable options, and, in effect, provided for a temporary waiver of the examination until the time stated in the induction order. It should be noted that this procedure does not allow the board to *induct* anyone without a physical examination; rather it simply allows the board to *call* persons for induction prior to the time an examination is given.[2]

Having been convicted in the District Court, petitioner took a direct appeal to the Court of Appeals for the Ninth Circuit. While the appeal was pending in that court, however, this Court decided *Gutknecht*, and the Court of Appeals then remanded the case to the District Court for further consideration in light of our decision. On remand, the District Court decided that *Gutknecht* did not apply because petitioner's induction had not in fact been accelerated.[3] The court also found that "[d]efendant's substantial rights were not prejudiced by the Local Board's ordering him to report for induction without first giving him a physical examination and sending

[2] The District Court specifically found that petitioner "would have received a complete physical examination prior to induction had he reported on July 11, 1967, as ordered." Pet. for Cert. 10a.

[3] *Id.*, at 9a.

him a Notice of Acceptability," [4] because "[t]he failure to give such an examination and such Notice of Acceptability were [*sic*] caused by defendant's own failure to report for physical examination on October 8, 1965, as ordered." [5] The Court of Appeals agreed that *Gutknecht* did not control this case and affirmed.[6] We denied certiorari.[7]

Although one might have supposed the proceedings to be closed at this point, our denial of certiorari marked only the end of phase one. For petitioner, having failed on his direct attack, then sought relief under 28 U. S. C. § 2255, presenting the same claims of acceleration which had previously been rejected. The principal basis for petitioner's motion was that the law of the Ninth Circuit, unfavorable to him at the time of his conviction and appeal, had subsequently been changed in *United States* v. *Fox*, 454 F. 2d 593 (1971). The District Court denied relief without comment, and the Court of Appeals again affirmed.[8] Stating that "[t]he decision on the direct appeal is the law of the case," [9] that court also noted specifically "that *Fox* does not even suggest overruling *Davis*," [10] and further that "the new law, or change in law, rule is not applied in this circuit under circumstances such as here presented. Odom v. United States, *supra*." [11] Again one would suppose that the dispute had reached its end, but this Court today decrees otherwise, remanding it for yet more consideration by the courts below.

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[4] *Ibid.*
[5] *Id.*, at 9a–10a.
[6] 447 F. 2d 1376.
[7] 405 U. S. 933.
[8] 472 F. 2d 596.
[9] *Ibid.*
[10] *Ibid.*
[11] *Ibid.*

III

For reasons that I frankly do not understand, the Court seems to believe that the question of whether claims such as petitioner's may be raised in a motion under § 2255 is either largely settled by § 2255 itself and by earlier decisions of this Court or, perhaps, is too inconsequential to require extended treatment. Neither premise is sound. Both the language of § 2255 and the case law of this Court suggest that the issue is very much in doubt, and the potential consequences of the decision suggest that the matter calls for serious and careful consideration.

In deciding whether claims of this type may be raised in a § 2255 motion, the logical starting place is the statute itself. The Court's opinion, however, gives the statute only a passing nod, apparently believing that ambiguity is best resolved by ignoring the source from which it arises. I believe the statute and the Court's treatment of it require a closer look.

The Court begins its discussion of the statute by stating: "At the outset, we note that the Government's position finds scant support in the text of § 2255, which permits a federal prisoner to assert a claim that his confinement is 'in violation of the Constitution *or laws* of the United States.' " [12] (Emphasis in Court's opinion.) The language quoted by the Court is taken from the first paragraph of § 2255 which reads:

> "A prisoner in custody under sentence of a court established by Act of Congress claiming the right to be released upon the ground that the sentence was imposed in violation of the Constitution or laws of the United States, or that the court was without jurisdiction to impose such sentence, or that the

[12] *Ante,* at 342–343.

> sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack, may move the court which imposed the sentence to vacate, set aside or correct the sentence."

That paragraph, however, does not speak of an illegal "*confinement*," as suggested by the Court, or even of an illegal *conviction*, but rather of illegal *sentences*. Furthermore, the paragraph is concerned only with motions for relief, not with the Court's power to grant relief. The power to grant relief is instead governed by the more specific provisions of paragraph three of the statute.

The language of paragraph three differs quite strikingly from the language quoted above. After providing for notice and a hearing in appropriate cases, the paragraph continues:

> "If the court finds that the judgment was rendered without jurisdiction, or that the sentence imposed was not authorized by law or otherwise open to collateral attack, or that there has been such a denial or infringement of the constitutional rights of the prisoner as to render the judgment vulnerable to collateral attack, the court shall vacate and set the judgment aside and shall discharge the prisoner or resentence him or grant a new trial or correct the sentence as may appear appropriate."

This language certainly makes less clear the intended scope of paragraph one, since, contrary to the emphasis on "sentence" in the earlier paragraph, the provisions of paragraph three mention "sentence" which may be set aside only twice, and then in connection with those "not authorized by law or otherwise open to collateral attack . . . ." [13] More importantly, the paragraph makes

[13] The statute seems, at times, to use the terms "sentence" and "judgment" interchangeably, for paragraph three allows relief from

no mention of judgments rendered in violation of the *laws* of the United States. Rather the paragraph permits relief only where "there has been such a denial or infringement of the *constitutional* rights of the prisoner as to render the judgment vulnerable to collateral attack . . . ." (Emphasis added.) Thus a district court may grant relief under this section only where (1) the judgment rendered was without jurisdiction; (2) the sentence was not authorized by law or is otherwise open to collateral attack; or (3) there has been such a denial of constitutional rights as to render the judgment vulnerable to collateral attack. Petitioner's case does not even arguably meet any one of these tests: the District Court clearly had jurisdiction to render a judgment of conviction; the sentence was concededly within the limits authorized by law and not otherwise vulnerable; and the Court apparently accepts the fact that petitioner has not presented a constitutional claim against the judgment. Nothing in the more generalized reference to "laws of the United States" in the first paragraph of § 2255, therefore, can redeem petitioner's complete failure to bring himself within the operative language of the third paragraph.[14]

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judgments in specified instances while paragraph one would seem to allow attacks only on sentences. But the fact that no distinction is made between the terms in paragraph one does not mean that their contrasting use in paragraph three can automatically be deemed without significance. The Court should attempt to reach a reasonable interpretation based upon the particular context of the statute and the historical background of collateral relief, rather than simply abandoning the statute to study its legislative history. See, *e. g.*, *United States* v. *Sobell*, 314 F. 2d 314 (CA2), cert. denied, 374 U. S. 857 (1963).

[14] It might be argued, of course, that the first paragraph of § 2255 was for some reason designed to permit the filing of motions for relief even in some cases where relief could not be granted under paragraph three. But the Court offers no reason, and I can think of none, why Congress would encourage such a futile exercise. What

The Court, however, strongly suggests that its opinion could rest upon the provision of paragraph three providing relief for "sentence[s] . . . otherwise open to collateral attack." This suggestion only compounds the confusion. To begin with, it seems odd that the Court chooses to bypass the language of that same sentence dealing with sentences (rather than judgments) "not authorized by law" since that language far more closely parallels the language from the first paragraph cited by the Court. But, in any event, reading words "otherwise open to collateral attack" as simply a catch-all phrase, including any recognizable ground for upsetting convictions on direct appeal makes it difficult to see why Congress then bothered to include the separate provision allowing relief when "there has been such a denial or infringement of the constitutional rights of the prisoner as to render the judgment vulnerable to collateral attack . . . ." The Court could not reasonably argue that this provision is intended to give additional protection to constitutional rights because the Court purports to find no distinction in the statute between constitutional and nonconstitutional attacks on judgments of conviction.

But assuming for the moment that the Court's approach is correct, I find a second obstacle to this decision in the definition, or lack of definition, of the word "laws." For though the Court seems to accept that petitioner has stated a recognizable claim that his sentence was somehow imposed in violation of the laws of the United States, the Court only briefly mentions what law the sentence is thought to be in violation of. Certainly petitioner cannot contend that his sentence under 50 U. S. C. App. § 462 (a) for refusing to report for induction is in violation

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the Court has done is simply to read most of paragraph three out of the statute, apparently assuming that its more specific provisions have no function in a proper interpretation of § 2255.

of *that* section. Nor does he point to any other statutory provision which prohibits his incarceration for that offense. Therefore the basis for the claim, as the Court seems to believe, lies somewhere in the holdings of this Court in *Gutknecht* and of the Court of Appeals for the Ninth Circuit in *Fox*. The inclusion of either of these decisions in the category of "laws of the United States" merits some additional attention.

The term "laws of the United States" was included in § 2255 presumably to continue its traditional place in federal habeas corpus statutes.[15] The Habeas Corpus Act of 1867, c. 28, 14 Stat. 385, gave federal courts the power to grant writs of *habeas corpus* in all cases where any person may be restrained of his or her liberty "in violation of the constitution, or of any treaty or law of the United States . . . ." This language was carried forward in Rev. Stat. § 753 and now in 28 U. S. C. §§ 2241 (c)(3) and 2254 where the word "law" has been changed to "laws." The same phrasing has now been incorporated into § 2255. But the term's longevity has not brought with it a corresponding judicial elucidation. Like many other issues in the field of habeas corpus, the question seems to have been left for decision on a case-by-case basis.

Certainly a creditable argument could be made that the term "laws" applies only to federal statutes, not to individual decisions of the federal courts. In 1842, for example, only 25 years before the Habeas Corpus Act

[15] Section 2255 was enacted to provide the same relief available under the federal habeas corpus statute without the logistical problems encountered in the latter remedy. *United States* v. *Hayman*, 342 U. S. 205 (1952). The Court makes much of this fact in its opinion but then drops the issue without examining what constituted a "law" for purposes of habeas corpus or what the scope of habeas corpus relief has proved to be under the decisions of this Court.

was passed, this Court stated: "In the ordinary use of language it will hardly be contended that the decisions of Courts constitute laws." *Swift* v. *Tyson*, 16 Pet. 1, 18.[16] But even if some allowance for judicial law-making is made, the question in this case is not settled. For, if the law be *Gutknecht*, then the Court's "new law" argument immediately disappears. Petitioner had a full opportunity to argue the applicability of *Gutknecht* on remand from his first appeal, and both the District Court and Court of Appeals found that it was not controlling. Since that time no decision of this Court has modified *Gutknecht* in any way which would now bring petitioner within its scope. Thus the real focus of petitioner's argument must be that *Fox* is the governing law. But in that regard, I cannot see why a decision by a single panel of the Court of Appeals for the Ninth Circuit should be considered a "law" of the United States. In fact the Court of Appeals itself stated that its decision in *Fox* had not overruled *Davis*, pointing out that an en banc decision of the Court of Appeals would be necessary for such a result. Thus the Court today categorizes as a "law of the United States" a decision which is still open to question within the Court of Appeals' own jurisdiction.

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[16] The Court in *Swift* v. *Tyson*, *supra*, was considering a section of the Judiciary Act of 1789, § 34, 1 Stat. 92, which stated, in part: "[T]he laws of the several states, except where the constitution, treaties, or statutes of the United States shall otherwise require or provide, shall be regarded as rules of decision in trials at common law in the courts of the United States in cases where they apply." The Court, in explaining its doubt that court decisions constituted "laws" observed: "They are, at most, only evidence of what the laws are, and not of themselves laws. They are often re-examined, reversed, and qualified by the Courts themselves, whenever they are found to be either defective, or ill-founded, or otherwise incorrect." 16 Pet., at 18.

The Court gives no indication of where this loose process of definition will end. It would certainly be surprising if a decision of the Court of Appeals for the Fourth Circuit, for example, were sufficient to give prisoners in the Ninth Circuit grounds for a § 2255 motion, but it is not clear to me why a decision of the Fourth Circuit is any less a law of the United States than a decision of the Ninth Circuit. Concededly, it need not be considered binding on the Ninth Circuit, but that is not the concern under § 2255. Nor is it obvious to me what the Court would require a court of appeals to do when intracircuit conflicts arise. The decision today would seem to compel the Court to give a defendant already convicted according to one statutory interpretation the benefit of any more liberal interpretation which might emerge. This erratic process of interpretation finds no warrant in § 2255.

IV

The Court's lack of attention to the statutory language in this case is more than matched by the sparsity of the case law it cites. Although the Court seems to accept without question that both relief under § 2255 and habeas corpus relief have long been available to prisoners making nonconstitutional attacks on judgments of conviction, the Court cites not a single case from this Court that so holds.[17] Certainly neither *Sanders* v. *United States*, 373 U. S. 1 (1963), nor *Kaufman* v. *United States*, 394 U. S. 217 (1969), the two most significant § 2255 decisions in recent years, is controlling on the important issue pre-

[17] The Court, in fact, avoids the necessity for a closer look at the statutory language of § 2255 by turning instead to the provisions of the federal habeas statute as a guide. This reliance makes all the more curious the fact that the Court does not support its view of the scope of federal habeas by any convincing citation of authority.

sented here, for both decisions involved completely different factual situations and considerations.[18] *Hill* v. *United States*, 368 U. S. 424 (1962), a third important case under § 2255 and one cited by the Court in its opinion, would seem to cut against the Court's position. In *Hill* the Court held that a failure to follow the requirements of Fed. Rule Crim. Proc. 32 (a), a rule promulgated under the auspices of a federal statute, was not the type of error which could be raised on a § 2255 motion. The Court stated:

> "The failure of a trial court to ask a defendant represented by an attorney whether he has anything

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[18] The *Sanders* Court's statement of the issue before it clearly demonstrates how different that case was from the one now under consideration. In *Sanders* the Court said: "We consider here the standards which should guide a federal court in deciding whether to grant a hearing on a motion of a federal prisoner under 28 U. S. C. § 2255." 373 U. S., at 2. That issue arises, not under paragraph one of § 2255, setting forth the claims which a prisoner might make, or under that part of paragraph three setting forth the grounds on which relief might be granted, but under the language found earlier in paragraph three dealing with when a hearing must be held. Thus, the Court in *Sanders* was faced with the question, not of whether a particular type of claim is cognizable *at all* in a § 2255 proceeding, but simply whether a hearing is required on a claim concededly within the reach of that section.

The petitioner in *Kaufman*, in contrast to the petitioner here, sought relief on the ground that he had been subjected to an unconstitutional search and seizure. The Court's recognition of the constitutional tenor of his claim is evident throughout the opinion. For example, the Court clearly stated that "the availability of collateral remedies is necessary to insure the integrity of proceedings at and before trial *where constitutional rights are at stake*," 394 U. S., at 225 (emphasis added), and that "[t]he provision of federal collateral remedies rests more fundamentally upon a recognition that adequate protection of *constitutional rights* relating to the criminal trial process requires the continuing availability of a mechanism for relief." *Id.*, at 226 (emphasis added).

> to say before sentence is imposed is not of itself an error of the character or magnitude cognizable under a writ of habeas corpus. *It is an error which is neither jurisdictional nor constitutional.* It is not a fundamental defect which inherently results in a complete miscarriage of justice, nor an omission inconsistent with the rudimentary demands of fair procedure. It does not present 'exceptional circumstances where the need for the remedy afforded by the writ of habeas corpus is apparent.'" 368 U. S., at 428. (Emphasis added; citations omitted.)

The only other case mentioned by the Court which might be relevant to this issue is *Sunal* v. *Large,* 332 U. S. 174 (1947), a case like *Hill* in which this Court *denied* relief for a claim with no constitutional foundation. The Court today suggests, by stress on a negative pregnant, that the decision to deny habeas corpus relief in that case was grounded solely on the petitioner's failure to raise his claim on direct appeal and that if the issue had been properly raised, the Court would have reached a different conclusion. It is true, of course, that collateral relief is not to be employed as a substitute for an appeal, and *Sunal* is a leading case for that proposition. But a reading of *Sunal* which recognizes only the effect of failure to appeal is unnecessarily grudging. The Court in *Hill,* for example, although faced with a situation in which the noncompliance with Rule 32 (a) was not raised on appeal, did not imply that the error could have been raised in § 2255 proceedings if an appeal had been taken. Rather the Court stated flatly: "We hold that the failure to follow the formal requirements of Rule 32 (a) is not of itself an error that can be raised by collateral attack . . . ." 368 U. S., at 426.

Although the scope of relief in a habeas corpus proceeding remains largely undefined, probably out of concern

that definition would introduce unwanted limitation, the judicial expansion of the federal courts' habeas power had not previously reached the type of claim asserted here. Certainly Mr. Justice Frankfurter's catalogue in *Sunal, supra,* at 185–186 (dissenting opinion), makes no mention of such grounds. And there is no dearth of authority to the effect that federal habeas corpus is not available merely to correct errors of law.[19] Many decisions of lower federal courts have at least implicitly limited collateral relief to claims of constitutional stature.[20]

The lack of foundation from which the Court now proceeds to fashion a new, expansive collateral-relief doctrine unfortunately suggests that the Court is prepared to extend or retract relief on the basis of whether a majority of the Court believes that a particular set of factual circumstances is "exceptional" or that a particular litigant has raised an appealing point. Thus, the petitioner in *Hill* is barred from raising his claim at all in a § 2255 proceeding because failure to comply with an explicit federal rule is "not of itself an error of the character or magnitude cognizable under a writ of habeas corpus." The petitioner in *Sunal* is also barred, despite a "far more compelling" claim than the one raised in *Hill,* see 368 U. S., at 428, apparently because he did not receive a previous rejection of his claim on direct appeal. But petitioner in this case succeeds. According to the Court, this case is different, for petitioner has already had his precise claim decided against him once, curiously enough a circumstance considered favorable for him, and because "[t]here can be no room for doubt that such a circumstance [conviction for failure to obey a possibly invalid order] 'inherently re-

[19] See, *e. g., Sunal* v. *Large,* 332 U. S. 174, 179 (1947).

[20] See, *e. g., DeMarco* v. *Willingham,* 401 F. 2d 105, 106 (CA7 1968); *Lothridge* v. *United States,* 441 F. 2d 919 (CA6 1971).

sults in a complete miscarriage of justice' and 'present[s] exceptional circumstances' that justify collateral relief under § 2255." It is difficult to see that this process of selection rests upon any reasoned distinctions which may be derived from either the statute or the cases.

V

The Court's rather brief dismissal of the Government's arguments in this case might be understandable were the issues of less importance, or the result less likely to produce severe repercussions. After all, the scope of § 2255 relief has been undefined for almost 25 years and it might be supposed that continuation of this state of affairs would cause no unusual difficulties. But the potential consequences of the Court's decision today make a *laissez-faire* attitude inappropriate. For, "[a]ssuming that there 'exists,' in an ultimate sense, a 'correct' decision of a question of law, we can never be assured that any particular tribunal has in the past made it: we can always continue to ask whether the right rule was applied, whether a new rule should not have been fashioned." Bator, Finality in Criminal Law and Federal Habeas Corpus for State Prisoners, 76 Harv. L. Rev. 441, 447 (1963). Two examples will suffice as illustrations.

(1) This Court occasionally, though not with great frequency, is called upon to resolve conflicts among the courts of appeals on nonconstitutional criminal questions. For example, in January of 1974, the Court decided *United States* v. *Maze*, 414 U. S. 395, a case in which we were asked to resolve a conflict among the courts of appeals concerning the circumstances under which fraudulent use of a credit card might violate the federal mail fraud statute. The Courts of Appeals for the Sixth and Tenth Circuits had construed the scope of the statute somewhat more narrowly than five other

courts of appeals. In *Maze* we approved the minority approach, agreeing with the Sixth Circuit that the respondent's conviction under the mail fraud statute should be reversed.

The Court's decision today seems to provide full opportunity for all defendants convicted under the Mail Fraud Act in the circuits whose view was not accepted to relitigate those convictions in a § 2255 proceeding. Most of those convictions have received full appellate review, and many defendants had unsuccessfully sought certiorari in this Court. The district courts, faced with this influx of motions, will be faced with the difficult task of sifting through various factual claims to determine if the principles of *Maze* should be applied. I suspect that the burden will not be inconsiderable.

(2) The Court of Appeals for the Ninth Circuit, in affirming the dismissal of petitioner's § 2255 motion, cited its own decision in *Odom* v. *United States,* 455 F. 2d 159 (1972). That case involved the question of whether the petitioner was entitled to the benefit of *Wade* v. *United States,* 426 F. 2d 64 (1970), a case which had established new law on insanity for the Ninth Circuit. At the time *Wade* was decided the Court of Appeals specifically held that the decision should apply only to "convictions [which] have not become final as of the date of this decision." [21] Under my reading of the Court's opinion in this case, however, petitioner Odom and anyone else who had raised an insanity defense in the Ninth Circuit may now proceed to file § 2255 motions in the District Court. For Davis' conviction was as final as Odom's conviction, and no basis is evident for saying that one decision is less a "law of the United States" than the other.

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[21] 426 F. 2d, at 74.

The effect will be twofold. First, federal courts which are already overburdened with cases will find that burden increased. As Mr. Justice Jackson noted in *Brown* v. *Allen*, 344 U. S. 443, 537 (1953) (concurring in result): "It must prejudice the occasional meritorious application to be buried in a flood of worthless ones." Second, there will be substantial disincentive for federal courts to overthrow settled doctrines, no matter how salutary new ones might seem. Although enlightened jurisprudence may call for adopting new policies or correcting errors of interpretation, any court considering such changes must be constantly aware that numerous final convictions will thereupon be placed in jeopardy. The possible, and often undeserved, advantage to a particular litigant is thus obtained at a cost to the entire judicial system.

These examples unfortunately may be multiplied. Admittedly, the Court does attempt to set a minimum threshold for such claims, requiring " 'a fundamental defect . . . inherently result[ing] in a complete miscarriage of justice,' " and " 'exceptional circumstances where the need for the remedy afforded by the writ of *habeas corpus* is apparent.' " (*Ante*, at 346.) This dictum, it is hoped will partially offset the effect of the holding in this case, though if this petitioner's case represents a miscarriage of justice it is hard to imagine one that does not. But one must be concerned that the Court, having taken this giant step so casually, may find the next step equally easy to take, allowing perhaps challenges to evidentiary rulings and other trial matters heretofore considered inappropriate for federal habeas corpus.

VI

The decision in this case cannot reasonably be explained by the maxim "Hard cases make bad law," for although the law made is bad the case is not hard.

Whatever reason there might be to strain the contours of § 2255 to permit relief to someone visited with obvious injustice, the fact is that this petitioner has had full opportunity to make his case at every stage of the way. He has alleged no deprivation of his rights to a full and fair hearing at trial, no deprivation of his right to appeal, no inability to get adequate consideration on appellate review. He simply alleges that had his case been appealed at a different time he would have won it. I cannot find that those circumstances are so exceptional as to warrant the result reached today.

I therefore dissent from the Court's opinion. Were I persuaded otherwise, on that score, however, I would nonetheless agree for the reasons stated by MR. JUSTICE POWELL in his concurring and dissenting opinion, *ante*, p. 347, that the judgment should be affirmed.

Syllabus

CITY OF PITTSBURGH *v.* ALCO PARKING CORP. ET AL.

CERTIORARI TO THE SUPREME COURT OF PENNSYLVANIA

No. 73–582. Argued April 15, 1974—Decided June 10, 1974

Respondent operators of offstreet parking facilities in Pittsburgh, Pa., sued to enjoin the enforcement of a city ordinance imposing an increased 20% tax on the gross receipts from parking or storing automobiles at nonresidential parking places, alleging, *inter alia*, that the ordinance was invalid under the Due Process Clause of the Fourteenth Amendment. The lower courts sustained the ordinance, but the Pennsylvania Supreme Court invalidated it on the ground that the tax was so unreasonably high and burdensome that, in the context of competition from public lots operated by the city parking authority, which enjoyed certain tax exemptions and other advantages, the ordinance had the "effect" of an uncompensated taking of property contrary to the Due Process Clause. *Held:* The ordinance is not unconstitutional, and the city was constitutionally entitled to put the automobile parker to the choice of using other transportation or paying the increased tax. Pp. 373–379.

(a) The fact that a tax is so excessive as to render a business unprofitable or even threaten its existence furnishes no ground for holding the tax unconstitutional, *Magnano Co.* v. *Hamilton*, 292 U. S. 40; *Alaska Fish Co.* v. *Smith*, 255 U. S. 44, and the judiciary should not infer from such fact, alone, a legislative attempt to exercise a forbidden power in the form of a seeming tax. Pp. 373–376.

(b) The ordinance does not lose its character as a tax or revenue-raising measure and may not be invalidated as too burdensome under the Due Process Clause merely because the taxing authority, directly or through an instrumentality enjoying various forms of tax exemption, competes with the taxpayer in a manner that the judiciary thinks is unfair, since the Due Process Clause does not demand of or permit the judiciary to undertake to separate burdensome and nonburdensome taxes or to oversee the terms and circumstances under which the government or its tax-exempt instrumentalities may compete with the private sector. Pp. 376–377.

453 Pa. 245, 307 A. 2d 851, reversed.

WHITE, J., delivered the opinion for a unanimous Court. POWELL, J., filed a concurring opinion, *post*, p. 379.

Ralph Lynch, Jr., argued the cause for petitioner. With him on the brief was *Grace S. Harris*.

Leonard Boreman argued the cause for respondents. With him on the brief were *Richard H. Martin, Leonard M. Marks*, and *Eric Bregman*.*

MR. JUSTICE WHITE delivered the opinion of the Court.

The issue in this case is the validity under the Federal Constitution of Ordinance No. 704, which was enacted by the Pittsburgh, Pennsylvania, City Council in December 1969, and which placed a 20% tax on the gross receipts obtained from all transactions involving the parking or storing of a motor vehicle at a nonresidential parking place in return for a consideration.[1] The ordinance

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**James S. Hostetler* filed a brief for the Council for Private Enterprise et al. as *amici curiae*.

[1] The ordinance defined a nonresidential parking place as follows:

"(c) 'Non-Residential Parking Place' or 'Parking Place'—any place within the City, whether wholly or partially enclosed or open, at which motor vehicles are parked or stored for any period of time in return for a consideration not including:

"(i) any parking area or garage to the extent that it is provided or leased to the occupants of a residence on the same or other premises for use only in connection with, and as accessory to, the occupancy of such residence, and (ii) any parking area or garage operated exclusively by an owner or lessee of a hotel, an apartment hotel, tourist court or trailer park, to the extent that the parking area or garage is provided to guests or tenants of such hotel, tourist court or trailer park for no additional consideration.

"As used herein, the term 'residence' includes (i) any building designed and used for family living or sleeping purposes other than a hotel, apartment hotel, tourist court or trailer park, and (ii) any dwelling unit located in a hotel or apartment hotel.

"The terms 'hotel,' 'apartment hotel,' 'tourist court,' 'trailer

superseded a 1968 ordinance imposing an identical tax, but at the rate of 15%, which in turn followed a tax at the rate of 10% imposed by the city in 1962. Soon after its enactment, 12 operators of offstreet parking facilities located in the city sued to enjoin enforcement of the ordinance, alleging that it was invalid under the Equal Protection and Due Process Clauses of the Fourteenth Amendment, as well as Art. VIII, § 1, of the Pennsylvania Constitution, which requires that taxes shall be uniform upon the same class of subjects. It appears from the findings and the opinions in the state courts that, at the time of suit, there were approximately 24,300 parking spaces in the downtown area of the city, approximately 17,000 of which the respondents operated. Another 1,000 were in the hands of private operators not party to the suit. The balance of approximately 6,100 was owned by the Parking Authority of the city of Pittsburgh, an agency created pursuant to the Parking Authority Law of June 5, 1947, Pa. Stat. Ann., Tit. 53, § 341 *et seq.* (1974). The trial court also found that there was then a deficiency of 4,100 spaces in the downtown area.

The Court of Common Pleas sustained the ordinance. Its judgment was affirmed by the Commonwealth Court by a four-to-three vote, 6 Pa. Commw. 433, 291 A. 2d 556 (1972), on rehearing, 6 Pa. Commw. 453, 295 A. 2d 349 (1972); but the Pennsylvania Supreme Court reversed, also four to three. 453 Pa. 245, 307 A. 2d 851 (1973). That court rejected challenges to the ordinance under the Pennsylvania Constitution and the Equal Protection Clause, but invalidated the ordinance as an uncompensated taking of property contrary to the Due Process Clause of the Fourteenth Amendment. Because the decision appeared to be in

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park' and 'dwelling unit' are used herein as defined in the Zoning Ordinance, Ordinance No. 192, approved May 10, 1958, as amended."

conflict with the applicable decisions of this Court, we granted certiorari, 414 U. S. 1127 (1974), and we now reverse the judgment.[2]

In the opinion of the Supreme Court of Pennsylvania, two aspects of the Pittsburgh ordinance combined to deprive the respondents of due process of law. First, the court thought the tax was "unreasonably high" and was responsible for the inability of nine of 14 different private parking lot operators to conduct their business at a profit and of the remainder to show more than marginal earnings. 453 Pa., at 259–260, 307 A. 2d, at 859–860. Second, private operators of parking lots faced competition from the Parking Authority, a public agency enjoying tax exemption (although not necessarily from this tax) [3]

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[2] It appears from the opinion of the Pennsylvania Supreme Court that Ordinance No. 704 was itself superseded while appeal was pending in the state courts. 453 Pa. 245, 266 n. 13, 307 A. 2d 851, 863 n. 13. The new ordinance, effective April 1, 1973, imposed a 20% tax on the consideration paid in nonresidential parking transactions, the tax to be collected from the patron by the operator. This case is not mooted by the new ordinance, however, for there remains the issue of substantial refunds of taxes collected under Ordinance No. 704.

[3] The ordinance on its face applies to all nonresidential parking transactions. The following, however, appears in n. 9 of the opinion of the Pennsylvania Supreme Court, 453 Pa., at 265, 307 A. 2d, at 862:

"As of this writing, the Allegheny County Court of Common Pleas has ruled that the Public Parking Authority is exempt from payment of the challenged gross receipts tax. *Public Parking Authority of Pittsburgh v. City of Pittsburgh*, No. 687, July Term, 1972. See *Allegheny County v. Moon Township*, 436 Pa. 54, 258 A. 2d 630 (1969). An appeal is presently pending before the Commonwealth Court.

"However, whether the Public Parking Authority is subject to the tax seems to make little real difference in the context of this present dispute. Even if the Authority had to pay the tax to the City it would mean only in reality an accounting transaction, transferring

and other advantages which enabled it to offer offstreet parking at lower rates than those charged by private operators. The average all-day rate for the public lots was $2 as compared with a $3 all-day rate for the private lots. *Ibid.* The court's conclusion was that "[w]here such an unfair competitive advantage accrues, generated by the use of public funds, to a local government at the expense of private property owners, without just compensation, a clear constitutional violation has occurred. . . ." "[T]he unreasonably burdensome 20 percent gross receipts tax, causing the majority of private parking lot operators to operate their businesses at a loss, in the special competitive circumstances of this case, constitutes an unconstitutional taking of private property without due process of law in violation of the Fourteenth Amendment of the United States Constitution." *Id.*, at 267, 269–270, 307 A. 2d, at 863, 864.

We cannot agree that these two considerations, either alone or together, are sufficient to invalidate the parking tax ordinance involved in this case. The claim that a particular tax is so unreasonably high and unduly burdensome as to deny due process is both familiar and recurring, but the Court has consistently refused either to undertake the task of passing on the "reasonableness" of a tax that otherwise is within the power of Congress or of state legislative authorities, or to hold that a tax is unconstitutional because it renders a business unprofitable.

In *Magnano Co.* v. *Hamilton*, 292 U. S. 40 (1934), the Court sustained against due process attack a state excise tax of 15¢ per pound on all butter substitutes sold in the

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dollars from one pocket of an instrumentality of City government to another. Thus although appellants' argument would be strengthened by the common pleas court's decision, we need not presently rest our decision upon *Public Parking Authority of Pittsburgh v. City of Pittsburgh*, supra."

State. Conceding that the "tax is so excessive that it may or will result in destroying the intrastate business of appellant," *id.*, at 45, the Court held that "the due process of law clause contained in the Fifth Amendment is not a limitation upon the taxing power conferred upon Congress," that no different rule should be applied to the States and that a tax within the lawful power of a State should not "be judicially stricken down under the due process clause simply because its enforcement may or will result in restricting or even destroying particular occupations or businesses." *Id.*, at 44. The premise that a tax is invalid if so excessive as to bring about the destruction of a particular business, the Court said, had been "uniformly rejected as furnishing no juridical ground for striking down a taxing act." *Id.*, at 47. *Veazie Bank* v. *Fenno*, 8 Wall. 533, 548 (1869); *McCray* v. *United States*, 195 U. S. 27 (1904); and *Alaska Fish Co.* v. *Smith*, 255 U. S. 44 (1921), are to the same effect.

In *Alaska Fish*, a tax on the manufacture of certain fish products was sustained, the Court saying, *id.*, at 48–49: "Even if the tax should destroy a business it would not be made invalid or require compensation upon that ground alone. Those who enter upon a business take that risk. . . . We know of no objection to exacting a discouraging rate as the alternative to giving up a business, when the legislature has the full power of taxation." See also *International Harvester Co.* v. *Wisconsin Dept. of Taxation*, 322 U. S. 435, 444 (1944); *Child Labor Tax Case*, 259 U. S. 20, 30 (1922); *Brushaber* v. *Union Pacific R. Co.*, 240 U. S. 1, 24 (1916); *Flint* v. *Stone Tracy Co.*, 220 U. S. 107, 168–169 (1911).

Neither the parties nor the Pennsylvania Supreme Court purports to differ with the foregoing principles. But the state court concluded that this was one of those "rare and special instances" recognized in *Magnano* and

other cases where the Due Process Clause may be invoked because the taxing statute is "so arbitrary as to compel the conclusion that it does not involve an exertion of the taxing power, but constitutes, in substance and effect, the direct exertion of a different and forbidden power, as, for example, the confiscation of property." 292 U. S., at 44.[4]

There are several difficulties with this position. The ordinance on its face recites that its purpose is "[t]o provide for the general revenue by imposing a tax . . . ," and in sustaining the ordinance against an equal protection challenge, the state court itself recognized that commercial parking lots are a proper subject for special taxation and that the city had decided, "not without reason, that commercial parking operations should be singled out for special taxation *to raise revenue* because of traffic related problems engendered by these operations." 453 Pa., at 257, 307 A. 2d, at 858 (emphasis added).

It would have been difficult from any standpoint to have held that the ordinance was in no sense a revenue measure. The 20% tax concededly raised substantial sums of money; and even if the revenue collected had been insubstantial, *Sonzinsky* v. *United States,* 300 U. S. 506, 513–514 (1937), or the revenue purpose only secondary, *Hampton & Co.* v. *United States,* 276 U. S. 394, 411–413 (1928), we would not necessarily treat this exaction as anything but a tax entitled to the presumption of the validity accorded other taxes imposed by a State.

[4] Cf. *Heiner* v. *Donnan,* 285 U. S. 312, 326 (1932); *Nichols* v. *Coolidge,* 274 U. S. 531, 542 (1927); *Child Labor Tax Case,* 259 U. S. 20, 37 *et seq.* (1922); *Brushaber* v. *Union Pacific R. Co.,* 240 U. S. 1, 24–25 (1916); *McCray* v. *United States,* 195 U. S. 27, 60 (1904); *Henderson Bridge Co.* v. *Henderson City,* 173 U. S. 592, 614–615 (1899); *M'Culloch* v. *Maryland,* 4 Wheat. 316, 423 (1819).

Rather than conclude that the 20% levy was not a tax at all, the Pennsylvania court accepted it as such and merely concluded that it was so unreasonably high and burdensome that, in the context of competition by the city, the ordinance had the "effect" of an uncompensated taking of property. 453 Pa., at 269, 307 A. 2d, at 864. The court did not hold a parking tax, as such, to be beyond the power of the city but it appeared to hold that a bona fide tax, if sufficiently burdensome, could be held invalid under the Fourteenth Amendment. This approach is contrary to the cases already cited, particularly to the oft-repeated principle that the judiciary should not infer a legislative attempt to exercise a forbidden power in the form of a seeming tax from the fact, alone, that the tax appears excessive or even so high as to threaten the existence of an occupation or business. *Magnano Co.* v. *Hamilton, supra,* at 47; *Child Labor Tax Case, supra,* at 40–41; *Veazie Bank* v. *Fenno, supra,* at 548.

Nor are we convinced that the ordinance loses its character as a tax and may be stricken down as too burdensome under the Due Process Clause if the taxing authority, directly or through an instrumentality enjoying various forms of tax exemption, competes with the taxpayer in a manner thought to be unfair by the judiciary. This approach would demand not only that the judiciary undertake to separate those taxes that are too burdensome from those that are not, but also would require judicial oversight of the terms and circumstances under which the government or its tax-exempt instrumentalities may undertake to compete with the private sector. The clear teaching of prior cases is that this is not a task that the Due Process Clause demands of or permits to the judiciary. We are not now inclined to chart a different course.

In *Veazie Bank, supra,* a 10% tax on state bank notes was sustained over the objection of the dissenters that the purpose was to foster national banks, instrumentalities of the National Government, in preference to private banks chartered by the States. More directly in point is *Puget Sound Co.* v. *Seattle,* 291 U. S. 619 (1934), where the city imposed a gross receipts tax on a power and light company and at the same time actively competed with that company in the business of furnishing power to consumers. The company's contention was that "constitutional limitations are transgressed . . . because the tax affects a business with which the taxing sovereign is actively competing." *Id.,* at 623. Calling on prior cases in support, the Court rejected the contention, holding that "the Fourteenth Amendment does not prevent a city from conducting a public water works in competition with private business or preclude taxation of the private business to help its rival to succeed." *Id.,* at 626. See also *Madera Water Works* v. *Madera,* 228 U. S. 454 (1913). The holding in *Puget Sound* remains good law and, together with the other authorities to which we have already referred, it is sufficient to require reversal of the decision of the Pennsylvania Supreme Court.

Even assuming that an uncompensated and hence forbidden "taking" could be inferred from an unreasonably high tax in the context of competition from the taxing authority, we could not conclude that the Due Process Clause was violated in the circumstances of this case. It was urged by the city that the private operators would not suffer because they could and would pass the tax on to their customers, who, as a class, should pay more for the services of the city that they directly or indirectly utilize in connection with the special problems incident to the twice daily movement of large numbers of cars on the streets of the city and in and out of parking garages.

The response of the Pennsylvania Supreme Court was that competition from the city prevented the private operators from raising their prices and recouping their losses by collecting the tax from their customers. On the record before us, this is not a convincing basis for concluding that the parking tax effected an unconstitutional taking of respondents' property. There are undisturbed findings in the record that there were 24,300 parking places in the downtown area, that there was an overall shortage of parking facilities, and that the public authority supplied only 6,100 parking spaces. Because these latter spaces were priced substantially under the private lots it could be anticipated that they would be preferred by those seeking parking in the downtown area. Insofar as this record reveals, for the 20% tax to have a destructive effect on private operators as compared with the situation immediately preceding its enactment, the damage would have to flow chiefly, not from those who preferred the cheaper public parking lots, but from those who could no longer afford an increased price for downtown parking at all. If this is the case, we simply have another instance where the government enacts a tax at a "discouraging rate as the alternative to giving up a business," a policy to which there is no constitutional objection. *Alaska Fish Co.* v. *Smith,* 255 U. S., at 49; *Magnano Co.* v. *Hamilton,* 292 U. S., at 46.

The parking tax ordinance recited that "[n]on-residential parking places for motor vehicles, by reason of the frequency rate of their use, the changing intensity of their use at various hours of the day, their location, their relationship to traffic congestion and other characteristics, present problems requiring municipal services and affect the public interest, differently from parking places accessory to the use and occupancy of residences." By enacting the tax, the city insisted that those providing and

utilizing nonresidential parking facilities should pay more taxes to compensate the city for the problems incident to offstreet parking. The city was constitutionally entitled to put the automobile parker to the choice of using other transportation or paying the increased tax.

The judgment of the Pennsylvania Supreme Court is

Reversed.

MR. JUSTICE POWELL, concurring.

The opinion of the Court fully explicates the issue presented here, and I am in accord with its resolution. I write briefly only to emphasize my understanding that today's decision does not foreclose the possibility that some combination of unreasonably burdensome taxation and direct competition by the taxing authority might amount to a taking of property without just compensation in violation of the Fifth and Fourteenth Amendments.

To some extent, private business is inevitably handicapped by direct governmental competition, but the opinion of the Court makes plain that the legitimate exercise of the taxing power is not to be restrained on this account. It is conceivable, however, that punitive taxation of a private industry and direct economic competition through a governmental entity enjoying special competitive advantages would effectively expropriate a private business for public profit. Such a combination of unreasonably burdensome taxation and public competition would be the functional equivalent of a governmental taking of private property for public use and would be subject to the constitutional requirement of just compensation. As the opinion of the Court clearly reveals, *ante*, at 377–378, no such circumstance has been shown to exist in the instant case.

FEDERAL POWER COMMISSION *v.* TEXACO INC. ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 72–1490. Argued February 19, 1974—Decided June 10, 1974*

Following its notice of proposed rulemaking "propos[ing] prospectively to exempt from regulation under the Natural Gas Act all existing and all future jurisdictional sales made by small producers . . . ," and the filing of comments and informal conferences, the Federal Power Commission (FPC) issued Order No. 428, which exempted all existing and future sales by "small producers" from direct rate regulation, and provided that they could thereunder contract for the sale of their gas at any obtainable rates, without refund obligations with respect to increased rates, if any, collected for sales regulated thereunder to the pipelines. The FPC asserted that the order did not amount to "deregulation of sales by small producers," but was intended to regulate small producers' sales in the course of regulating the rates of pipeline and large-producer customers of the small producers. Pipelines purchasing from small producers above ceiling prices were to be allowed "tracking increases" in their rates, but those rates would be subject to refund "with respect to new small producer sales, but only as to that part of the rate which is unreasonably high considering appropriate comparisons with highest contract prices for sales by large producers or the prevailing market price for intrastate sales in the same producing area." The FPC asserted its intention of reviewing small-producer prices to maintain reasonable rates and specified that small producers remain subject to § 7 (b) of the Natural Gas Act. The Court of Appeals set aside the FPC order, holding that the small-producer blanket certificate procedure contravened the FPC's statutory responsibilities under §§ 4 and 5 of the Act to ensure "just and reasonable rates." It viewed the order as merely calling for rates that were not unreasonably high as compared with the highest contract prices for large-producer sales or the prevailing market price in the intrastate market, and

*Together with No. 72–1491, *Dougherty, Executor, et al.* v. *Texaco Inc. et al.*, also on certiorari to the same court.

the court held unacceptable the possible contention that market prices themselves would produce just and reasonable rates. *Held:*

1. The scheme for regulating small-producer rates indirectly did not exceed the FPC's statutory authority. Pp. 386–393.

(a) Order No. 428 is not invalid because it does not initially consider each company and the reasonableness of its rates, or because it has a two-tier system for small producers and large producers. Cf. *Permian Basin Area Rate Cases,* 390 U. S. 747. P. 390.

(b) Since pipeline rates are subject to refund to the extent that the purchased gas component of their rates is excessive, there is an incentive "to bargain prices down." Pp. 390–391.

(c) Requiring the pipelines and the large producers to assume risks in bargaining for reasonable prices from small producers that might entail refunds unrecoverable from the small producers, is not an abuse of the FPC's discretion under § 4 (e) in balancing the interests involved. Pp. 391–392.

(d) It is premature to assert that the indirect regulation contemplated by Order No. 428 is confiscatory, especially since the FPC is to maintain a close review of the avowedly experimental scheme. Pp. 392–393.

2. But it is not clear from the wording of Order No. 428 that it satisfies the statutory requirement that the sale price for gas sold in interstate commerce be just and reasonable; at the least, the order is too ambiguous to satisfy the standard of clarity that an administrative order must exhibit, and the implication that the reasonableness of the small producers' rates would be judged by the assertion that the FPC "would consider all relevant factors" in determining whether the proposed rates comported with the "public convenience and necessity," is insufficient to sustain the order. Pp. 394–397.

3. The FPC lacks authority to rely exclusively on market prices as the final measure of "just and reasonable" rates mandated by the Act; moreover, the FPC order made no finding as to the actual impact the market price increases would have on consumer gas expenditures. Pp. 397–399.

154 U. S. App. D. C. 168, 474 F. 2d 416, vacated and remanded.

WHITE, J., delivered the opinion of the Court, in which all Members joined except STEWART, J., who took no part in the consideration or decision of the cases.

Mark L. Evans argued the cause for petitioner in No. 72–1490. With him on the briefs were *Solicitor General Bork, Leo E. Forquer,* and *George W. McHenry, Jr.* *Ben F. Vaughan III* argued the cause for petitioners in No. 72–1491. With him on the briefs was *William Terry Bray.*

Christopher T. Boland and *Peter H. Schiff* argued the cause for respondents in both cases. With *Mr. Boland* on the brief for respondent Interstate Natural Gas Association of America were *Jerome J. McGrath* and *Robert G. Hardy.* With *Mr. Schiff* on the brief for respondent Public Service Commission of the State of New York was *Richard A. Solomon.* *Kirk W. Weinert* and *C. Fielding Early, Jr.,* filed a brief for respondent Texaco Inc. *Kenneth Heady, John L. Williford, Charles E. McGee, John T. Ketcham,* and *Robert J. Haggerty* filed a brief for respondent Phillips Petroleum Co. *Melvin Richter* and *L. F. Cadenhead* filed a brief for respondent Tennessee Gas Pipeline Co., a Division of Tenneco Inc. *Edward H. Forgotson* filed a brief for respondent Forgotson.†

MR. JUSTICE WHITE delivered the opinion of the Court.

This litigation involves the validity of Order No. 428 of the Federal Power Commission, 45 F. P. C. 454 (1971), which provides a blanket certificate procedure for small producers of natural gas, and relieves them of almost all filing requirements. The rates of small producers would no longer be directly regulated but would be subjected to indirect regulation through the review of purchased gas costs of the pipelines and large producers to whom these

†Briefs of *amici curiae* urging reversal in both cases were filed by *L. Dan Jones* for the Independent Petroleum Association of America, and by *J. Evans Atwell* and *Lynn R. Coleman* for the Small Producers Group.

small producers sell. The Court of Appeals, with one judge dissenting, set aside the order, 154 U. S. App. D. C. 168, 474 F. 2d 416 (1972), concluding that the Commission's order amounted to "deregulation" of small producers and was unauthorized by the Natural Gas Act (the Act), 52 Stat. 821, 15 U. S. C. § 717 *et seq.* Because the validity of the order is of obvious importance, we granted the petition for a writ of certiorari filed by the Commission in No. 72–1490 and by the estate of Mrs. James R. Dougherty, an intervenor in the Court of Appeals, in No. 72–1491. 414 U. S. 817 (1973).

I

On July 23, 1970, the Federal Power Commission issued a notice of proposed rulemaking "propos[ing] prospectively to exempt from regulation under the Natural Gas Act all existing and all future jurisdictional sales made by small producers . . . ." 35 Fed. Reg. 12,220 (1970). Following the filing of comments and informal conferences, the Commission, noting that one of its important responsibilities was "to assure maintenance of an adequate gas supply for the interstate market," issued Order No. 428, aimed at encouraging "small producers [1] to increase their exploratory efforts which are so important to the discovery of new sources of gas . . . to facilitate the entry of the small producer into the interstate market and to stimulate competition among producers to sell gas in interstate commerce." [2] The small

[1] A "small producer" was defined as an independent producer, not affiliated with a natural gas pipeline company, whose total jurisdictional sales on a nationwide basis, together with sales of affiliated producers, did not exceed 10,000,000 Mcf at 14.65 psia during any calendar year. New small-producer sales included any sale made pursuant to a contract dated after March 18, 1971.

[2] The Commission found that small producers produce about 10% of the gas purchased by pipelines, excluding all pipeline-to-pipeline

producer was to be assured that "when he enters into a new contract for the interstate sale of gas, the provisions of his contract will not be subject to change. We also want to relieve the small producer of the expenses and burdens relating to regulatory matters." 45 F. P. C., at 455. Accordingly, the order provided for a nationwide blanket certificate for small producers and relieved them, with some exceptions, from all filing requirements under the Act. Unlike large producers, subject to Commission-fixed ceilings on rates charged, the small producers could sell gas at the price the market would bear, even though in excess of maximum rates set for producers in pertinent area rate proceedings. Furthermore, they would have "no refund obligations with respect to increased rates, if any, collected for sales regulated hereunder to pipelines . . . ." *Id.*, at 457.

The order nevertheless asserted that the "action taken here in our view does not constitute deregulation of sales by small producers," *id.*, at 455, and that the Commission would continue to regulate such sales in the course of regulating the rates of pipelines and large producers to whom the small producers sell their gas. Pipelines purchasing from small producers at prices in excess of existing ceilings were to be permitted to file "tracking increases" in their rates, but those rates would be subject to refund "with respect to new small producer sales, but only as to that part of the rate which is unreasonably high considering appropriate comparisons with highest contract prices for sales by large producers or the prevailing market price for intrastate sales in the same producing area." *Id.*, at 457. The issue would be resolved either in pipeline rate cases, a proceeding limited to the tracking increase, or in

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sales. It appears, however, that they also account for 80% of the natural gas exploration in this country.

certificate cases. "The Commission shall consider all relevant factors." *Id.*, at 458. Review of tracking increases by pipelines was not anticipated as to existing contracts with small producers; the order authorized small producers to increase their rates under these contracts, terms permitting.

Large producers buying from small producers would be permitted tracking increases to the extent authorized by their contracts and without refund obligation "as long as the price differential is consistent with prevailing price differentials in the area and as long as the small producer prices for new gas are not unreasonably high, considering appropriate comparisons with highest contract prices by large producers or the prevailing market price for intrastate sales in the same producing area." *Id.*, at 456. To the extent that they reflected small-producer prices in excess of that standard, large-producer tracking increases would be subject to refund.

The Commission finally asserted that "[w]e intend to review the prices established in new contracts or contract amendments relating to sales by small producers to assure the reasonableness of the rates charged by such producers pursuant to the action we are taking herein. In the event we determine that this approach is inimical to the interests of consumers, we shall take further action to protect the consumers." *Id.*, at 459. The Commission apparently remained free to institute separate proceedings under § 5 (a) of the Act, 15 U. S. C. § 717d (a), to reduce the producer's rates prospectively.

The Commission also made clear that small producers remain subject to the requirements of § 7 (b) of the Act, 15 U. S. C. § 717f (b), with respect to the abandonment of jurisdictional sales, including those sales dealt with in the order. The order also limited the use of indefinite price escalation clauses in small-producer contracts and

excluded from the reach of the order small-producer sales made from reserves transferred by large producers.[3]

The Court of Appeals set aside the Commission order, holding that under the statute *all* natural gas sold in interstate commerce must carry just and reasonable rates and that even if indirect regulation was permissible under the statute, Order No. 428 was infirm because nothing in it satisfied the Commission's "duty to insure that all rates are 'just and reasonable.'" 154 U. S. App. D. C., at 173, 474 F. 2d, at 421. Instead, the order was thought merely to call for rates that were not unreasonably high as compared with the highest contract prices for large-producer sales or the prevailing market price in the intrastate market—"factors which [the Commission] does not regulate or which derive solely from market forces." *Ibid.* Nor could the court accept the possible argument that market forces themselves would produce just and reasonable rates, particularly when it understood the Commission itself to take the position that the just-and-reasonable standard was in no event mandatory. The Court of Appeals accordingly set aside the Commission's order.

II

The Commission does not contend in this Court that the Act permits it to exempt small-producer rates from regulation or to regulate those rates by any criterion less demanding than the just-and-reasonable standard mandated by §§ 4 and 5 of the Act, 15 U. S. C. §§ 717c and 717d. Its major propositions are, first, that Order No. 428, when properly understood, provides for just and

[3] Subsequently, the Commission issued two supplemental orders, Order No. 428–A, 45 F. P. C. 548, revising the annual statement requirements for small producers and Order No. 428–B, 46 F. P. C. 47, which denied applications for rehearing and modified Order No. 428 in respects that need not be mentioned here.

reasonable rates but through the means of indirect, rather than direct, regulation; and, second, that the Act does not forbid this kind of indirect regulation. Respondents, on the other hand, contend that the duty imposed by the Act to provide just and reasonable rates cannot be satisfied by indirect regulation and that Order No. 428 in any event abandons the just-and-reasonable standard with respect to small-producer rates.

We face first the issue as to the validity of indirect regulation of small-producer rates: on the assumption that Order No. 428 allows pipelines and large producers to reflect in their rates only just and reasonable charges for gas purchased from small producers, is the order valid? We hold that it is, for we see nothing in the Act which requires the Commission to fix the rates chargeable by small producers by orders directly addressed to them or which proscribes the kind of indirect regulation undertaken here.

The Act directs that all producer rates be just and reasonable but it does not specify the means by which that regulatory prescription is to be attained. That every rate of every natural gas company must be just and reasonable does not require that the cost of each company be ascertained and its rates fixed with respect to its own costs. Although for a time following *Phillips Petroleum Co.* v. *Wisconsin,* 347 U. S. 672 (1954), the Commission proceeded to regulate rates company by company, there was soon a shift to the technique of setting area rates based on composite cost considerations. We sustained this mode of rate regulation.

In *Wisconsin* v. *FPC,* 373 U. S. 294, 309 (1963), the Court affirmed the Commission's decision to abandon the individual cost-of-service method of fixing rates and to substitute area ratemaking. The Court said:

> "To declare that a particular method of rate regulation is so sanctified as to make it highly unlikely that

> any other method could be sustained would be wholly out of keeping with this Court's consistent and clearly articulated approach to the question of the Commission's power to regulate rates. It has repeatedly been stated that no single method need be followed by the Commission in considering the justness and reasonableness of rates . . . ."

This was wholly consistent with the Court's prior views, see *FPC* v. *Natural Gas Pipeline Co.*, 315 U. S. 575 (1942); *FPC* v. *Hope Natural Gas Co.*, 320 U. S. 591 (1944); *Colorado Interstate Gas Co.* v. *FPC*, 324 U. S. 581 (1945), and reaffirmed the principle which had been clearly stated in the *Hope* case: "Under the statutory standard of 'just and reasonable' it is the result reached not the method employed which is controlling." 320 U. S., at 602.

The principles of these prior cases were recognized and applied in the *Permian Basin Area Rate Cases*, 390 U. S. 747 (1968), where we sustained a two-tier system of rates for natural gas producers. In the course of doing so, we recognized that encouraging the exploration for and development of new sources of natural gas was one of the aims of the Act and one of the functions of the Commission. The performance of this role obviously involved the rate structure and implied a broad discretion for the Commission. The Court summarized the principles controlling the judicial review of Commission orders in terms very pertinent here:

> "The Act was intended to create, through the exercise of the national power over interstate commerce, 'an agency for regulating the wholesale distribution to public service companies of natural gas moving interstate'; *Illinois Gas Co.* v. *Public Service Co.*, 314 U. S. 498, 506; it was for this purpose expected to 'balanc[e] . . . the investor and the consumer

interests.' *FPC* v. *Hope Natural Gas Co.* [320 U. S.], at 603. This Court has repeatedly held that the width of administrative authority must be measured in part by the purposes for which it was conferred; see, *e. g., Piedmont & Northern R. Co.* v. *Comm'n,* 286 U. S. 299; *Phelps Dodge Corp.* v. *Labor Board,* 313 U. S. 177, 193–194; *National Broadcasting Co.* v. *United States,* 319 U. S. 190; *American Trucking Assns.* v. *United States,* 344 U. S. 298, 311. Surely the Commission's broad responsibilities therefore demand a generous construction of its statutory authority. [Footnote omitted.]

"Such a construction is consistent with the view of administrative rate making uniformly taken by this Court. The Court has said that the 'legislative discretion implied in the rate making power necessarily extends to the entire legislative process, embracing the method used in reaching the legislative determination as well as that determination itself.' *Los Angeles Gas Co.* v. *Railroad Comm'n,* 289 U. S. 287, 304. And see *San Diego Land & Town Co.* v. *Jasper,* 189 U. S. 439, 446. It follows that rate-making agencies are not bound to the service of any single regulatory formula; they are permitted, unless their statutory authority otherwise plainly indicates, 'to make the pragmatic adjustments which may be called for by particular circumstances.' *FPC* v. *Natural Gas Pipeline Co.* [315 U. S.], at 586." 390 U. S., at 776–777.

It followed that Commission action taken in the pursuit of a legitimate statutory goal enjoyed the presumption of validity, *id.,* at 767, and that he who would upset the rate order under the Act carries " 'the heavy burden of making a convincing showing that it is invalid because it is unjust and unreasonable in its consequences.' " *Ibid.*

Accepting these views of our role as a court sitting in review, we cannot at this point say that the Commission has exceeded its powers by instituting a regime of indirect regulation of small-producer rates. Surely it is not fatal to Order No. 428 that it does not, as an initial matter, consider the costs of each company and the reasonableness of its rates. Nor is the order vulnerable because there will be one level of just and reasonable rates for small producers and another for large producers. As previously noted, the Court approved two sets of just and reasonable rates in the *Permian Basin* cases, the justification being the necessity to stimulate exploration for and the development of new supplies of natural gas. *Id.*, at 796–797.

Indirect regulation through the mechanism of controlling large-producer costs will not merely recreate the situation which the Court in the *Phillips* case found to be inconsistent with the Natural Gas Act. In the pre-*Phillips* era, although asserting the right to pass on the prudentiality of various items of the pipelines' costs, the Commission did not purport to regulate the rates of producers with the aim of keeping them within just and reasonable limits, as the Commission now asserts it is doing under Order No. 428.

It is argued that permitting the small producers initially to charge what the market will bear and relying on later regulation of pipeline rates to protect the consumer is contrary to *Atlantic Refining Co.* v. *Public Service Comm'n*, 360 U. S. 378 (1959) (*CATCO*). But pipelines and large producers must file with the Commission their new contracts with the small producers, and their rates will be subject to suspension and refund within the limits set out in Order No. 428. As the Court noted in *FPC* v. *Sunray DX Oil Co.*, 391 U. S. 9, 26 (1968), the basic assumption which must have underlain the Court's *CATCO* decision was "that the purchasing pipe-

line, whose cost of purchase is a current operating expense which the pipeline is entitled to pass on to its customers as part of its rates, lacks sufficient incentive to bargain prices down." Here, on the other hand, the incentive is provided—pipeline rates are subject to refund to the extent that the purchased gas cost component of their rates is excessive.

This leads to the contention of the pipelines and the large producers that the scheme of indirect regulation envisioned by Order No. 428 unfairly subjects them to the risk of later determination that their gas costs are unjust and unreasonable and to the obligation to make refunds which they cannot in turn recover from the small producers whose rates have been found too high.[4] But those whose rates are regulated characteristically bear the burden and the risk of justifying their rates and their costs. Rate regulation unavoidably limits profits as well as income. "The fixing of prices, like other applications of the police power, may reduce the value of the property which is being regulated. But the fact that the value is reduced does not mean that the regulation is invalid." *FPC* v. *Hope Natural Gas Co.*, 320 U. S., at 601. All that is protected against, in a constitutional sense, is

[4] The large producers also contend that they are put at a disadvantage by the Commission's order because their contracts may not permit them to pass on the increased costs of gas purchased from small producers, whereas the pipelines will be in a position to do so. This is, however, a function of the producers' contracts, and the Commission has no authority, absent a finding that the existing contract rate "is so low as to have an adverse effect on the public interest," to permit large producers or pipelines to raise their rates in excess of the maximum authorized in their contracts, *FPC* v. *Sierra Pacific Power Co.*, 350 U. S. 348, 355 (1956); *United Gas Co.* v. *Mobile Gas Corp.*, 350 U. S. 332 (1956). We think other claims of the large producers, as to unfair treatment or discrimination, are equally ill-founded.

that the rates fixed by the Commission be higher than a confiscatory level. *FPC* v. *Natural Gas Pipeline Co.*, 315 U. S., at 585. In the context of the Act's rate regulation, whether any rate is confiscatory, or for that matter "just and reasonable," can only be judged by "the result reached, not the method employed." *FPC* v. *Hope Natural Gas Co., supra,* at 602. In the *Permian Basin Area Rate Cases,* 390 U. S., at 769, we stated a truism of rate regulation: "Regulation may, consistently with the Constitution limit stringently the return recovered on investment, for investors' interests provide only one of the variables in the constitutional calculus of reasonableness."

Here, requiring pipelines and the large producers to assume the risk in bargaining for reasonable prices from small producers is within the Commission's discretion in working out the balance of the interests necessarily involved. The consumer would be protected from current excessive rates, but at the expense of the pipeline, rather than the producer, who is engaged in necessary exploratory activity, thus serving the public interest in getting greater gas production but at just and reasonable rates. Under such circumstances, it is surely not an abuse of the discretion the Commission retains under § 4 (e) of the Act, see *Permian Basin Area Rate Cases, supra,* at 826–827, to refrain from imposing a refund obligation on the small producers.

Any broadside assertion that indirect regulation will be confiscatory is premature. The consequences of indirect regulation can only be viewed in the entirety of the rate of return allowed on investment, and this effect will be unknown until the Commission has applied its scheme in individual cases over a period of time. Moreover, the "regulation of producer prices is avowedly still experimental," *id.,* at 772, and Order No. 428 asserts the

Commission's intention to keep the experiment under close review. The Commission claims and is entitled to no license to be arbitrary or capricious in disallowing purchased gas costs of large producers and pipelines. The Commission may not exceed its authority under the Act; its orders are subject to judicial review; and reviewing courts must determine whether Commission orders, issued pursuant to indirect regulation, are supported by substantial evidence and whether it is rational to expect them "to maintain financial integrity, attract necessary capital, and fairly compensate investors for the risk they have assumed, and yet provide appropriate protection to the relevant public interests, both existing and foreseeable." *Id.*, at 792.

If, in the course of the necessary bargaining with small producers, the large producers and the pipelines are given no guidance whatsoever as to what the standards of the Commission may be, the risk of incurring unrefundable expenses that may later be disallowed is considerably enhanced. The scope of this possible difficulty is measured by the standards, or lack of them, by which the Commission will review the purchased gas costs of the large producers and the pipelines. As Order No. 428 reveals, the Commission is surely aware of the problem, and we would expect additional attention to be given this question in the course of the remand proceedings which, as explained in Part III, we think are necessary here.[5]

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[5] The New York Public Service Commission also questions whether it is administratively feasible for the FPC, on review of individual pipelines' costs, to make sure rates are just and reasonable, claiming that this would be a return with a vengeance to the administrative morass which led to the adoption of area rates for producers in the first instance. This claim is also premature in light of possible regulatory approaches the FPC may take on remand.

III

We turn now to whether Order No. 428 is invalid for failure to comply with the Act's requirement that the sale price for gas sold in interstate commerce be just and reasonable. The Court of Appeals rejected what it apparently understood was "the Commission's basic contention all along . . . that the 'just and reasonable' standard was not mandatory and that the FPC can simply choose not to regulate rates." 154 U. S. App. D. C., at 175, 474 F. 2d, at 422. Whatever the position of the Commission heretofore has been, it wisely does not challenge that aspect of the Court of Appeals judgment. Sections 4 and 5 of the Act require that all gas rates be just and reasonable; and the Court held in *Phillips* that this very prescription applies to the rates of all gas producers. The Commission may have great discretion as to how to insure just and reasonable rates, but it is plain enough to us that the Act does not empower it to exempt small-producer rates from compliance with that standard.

Section 16, 15 U. S. C. § 717*o*, upon which the Commission relies, is not to the contrary. It authorizes the Commission to perform any and all acts and to issue any and all rules and regulations "as it may find necessary or appropriate to carry out the provisions of this Act"; and "[f]or the purposes of its rules and regulations, the Commission may classify persons and matters within its jurisdiction and prescribe different requirements for different classes of persons or matters." But § 16 obviously does not vest authority in the Commission to set unjust and unreasonable rates, even for small producers. It does not authorize the Commission to set at naught an explicit provision of the Act. No producer is exempt from §§ 4 and 5. Neither the *Permian Basin Area Rate Cases* nor *FPC* v. *Louisiana Power & Light Co.*, 406 U. S. 621 (1972),

on which the Government relies, suggests or holds that § 16 permits the Commission to ignore the specific mandates of those sections.[6]

The Court of Appeals also read Order No. 428 as failing to provide a mechanism for insuring that small-producer rates will be just and reasonable. In its view, the order provided a pure market standard for the approval of the purchased gas costs of large producers and pipelines, a standard which fell short of the requirements of the Act. Accordingly, it set aside the order.

The Commission does not assert here that it is free under the Act to equate just and reasonable rates with the prices for gas prevailing in the market place. Its major remaining contention is that the Court of Appeals misread Order No. 428 and that the order, properly understood, contemplates a scheme of indirect regulation that would assure just and reasonable small-producer rates for natural gas and that would judge small-producer rates not only by market factors but by all the relevant considerations necessary to arrive at the considered judgment contemplated by the Act. For present purposes, then, the Commission accepts the Court of Appeals' construction of the Act; but insists that the order is consistent with the statute as so construed.

In this posture of the case, we think it clear that Order No. 428 cannot stand in its present form and that the cases should be remanded for further proceedings before the Commission. We have studied the order with care, and we cannot accept the construction of it that the Commission now presses upon us. At the very least, the order is so ambiguous that it falls short of that standard

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[6] The Commission's position is not advanced by *FPC* v. *Hunt*, 376 U. S. 515, 527 (1964). The Court in that case merely questioned whether exemption might prove, after study, to be an available alternative.

of clarity that administrative orders must exhibit. The Commission was bound to exercise its discretion within the limits of the standards expressed by the Act; and "for the courts to determine whether the agency *has* done so, it must 'disclose the basis of its order' and 'give clear indication that it has exercised the discretion with which Congress has empowered it.' " *Burlington Truck Lines* v. *United States*, 371 U. S. 156, 167–168 (1962), quoting in part from *Phelps Dodge Corp.* v. *NLRB*, 313 U. S. 177, 197 (1941). We shall indicate briefly our basis for this conclusion.

In the first place, Order No. 428 does not expressly mention the just-and-reasonable standard. It comes no closer than to subject pipeline rates to reduction and refund "only as to that part of the rate which is *unreasonably* high considering appropriate comparisons with highest contract prices for sales by large producers or the prevailing market price for intrastate sales . . . ." 45 F. P. C., at 457. (Emphasis added.) The order took a very similar approach to the tracking increases by large producers. Moreover, under the order, contractually authorized increases in rates for flowing gas under existing contracts could be automatically passed through by the pipelines and would not be subject to examination under the standard proposed by the order with respect to new sales by small producers. There was no finding that these contemplated increased rates for flowing gas would be just and reasonable. The Commission merely asserts in its brief here that it was familiar with the existing contracts and must have considered the rates reserved to be acceptable under the Act.

It is true that pipeline and large-producer costs for new small-producer gas were not to be "unreasonable" but the implication appears to be that reasonableness would be judged by the standard of the marketplace. It

is also true that the Commission asserted that it was not deregulating small-producer rates, that the Commission "shall consider all relevant factors" in determining whether proposed rates were consistent with the "public convenience and necessity," and that the Commission intended to review new contract prices charged by small producers "to assure . . . the reasonableness of the rates charged by such producers pursuant to the action we are taking herein." But these generalities do not supply the requisite clarity to the order or convince us that it should be sustained.

Had the order unambiguously provided what the Commission now asserts it was intended to provide,[7] we would have a far different case to decide. But as it is, we cannot "accept appellate counsel's *post hoc* rationalizations for agency action"; for an agency's order must be upheld, if at all, "on the same basis articulated in the order by the agency itself." *Burlington Truck Lines*, 371 U. S., at 168–169; *SEC* v. *Chenery Corp.*, 332 U. S. 194, 196 (1947).

IV

For the purposes of the proceedings that may occur on remand, we should also stress that in our view the prevailing price in the marketplace cannot be the final measure of "just and reasonable" rates mandated by the Act. It is abundantly clear from the history of the Act and from the events that prompted its adoption that Congress considered that the natural gas industry was heavily concentrated and that monopolistic forces were

[7] The Commission, in its brief, has indicated that the standard will not be limited to comparisons with appropriate market prices, but will include (1) producer's costs, (2) the pipeline's need for gas, (3) the availability of other gas supplies, (4) the amount of gas dedicated under the contract, and (5) the rates of other recent small-producer sales previously approved for flowthrough.

distorting the market price for natural gas.[8] Hence, the necessity for regulation and hence the statement in *Sunray DX*, 391 U. S., at 25, that if contract prices for gas were set at the market price, this

> "would necessarily be based on a belief that the current contract prices in an area approximate closely the 'true' market price—the just and reasonable rate. Although there is doubtless some relationship, and some economists have urged that it is intimate, such a belief would contradict the basic assumption that has caused natural gas production to be subjected to regulation . . . ." (Footnote omitted.)

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[8] As appears from § 1 (a) of the Act, 15 U. S. C. § 717 (a), the legislation stemmed from the 1935 Report of the Federal Trade Commission. S. Doc. No. 92, pt. 84–A, 70th Cong., 1st Sess. (published 1936). That report concluded that there was heavy concentration both in the production and distribution of natural gas. "The 4 largest producer groups account for about 72 percent of the output of natural gas produced by 32 holding company groups in 1930." *Id.*, at 589. The heavy concentration of pipeline ownership "accentuates whatever control the pipeline interests have of the available gas supply." *Id.*, at 590. The Commission concluded, on the basis of its detailed investigation of the industry, that "[t]he prime characteristic of the situation described is that of a steadily developing concert of interests dominating the producing, transporting, and distributing branches of the industry." *Id.*, at 600. The heart of the problem was at the pipeline end, since the concentration of ownership there allowed the concert of interests "to determine the amount of natural gas which may be marketed by fixing the amount which may be transported. That in turn gives it power to say how much shall be produced." *Ibid.* Based upon these findings, the Commission singled out as "Specific Evils Existing in the Natural-Gas Industry" both the "[u]nregulated monopolistic control of certain natural-gas production areas" and the "[u]nregulated control of pipeline transmission and of wholesale distribution." *Id.*, at 615. It concluded that regulation, at least of pipelines, see *id.*, at 616, was required.

In subjecting producers to regulation because of anti-competitive conditions in the industry, Congress could not have assumed that "just and reasonable" rates could conclusively be determined by reference to market price. Our holding in *Phillips* implies just the opposite. This does not mean that the market price of gas would never, in an individual case, coincide with just and reasonable rates or not be a relevant consideration in the setting of area rates, see *Permian Basin Area Rate Cases,* 390 U. S., at 793–795; it may certainly be taken into account along with other factors, *Southern Louisiana Area Rate Cases,* 428 F. 2d 407, 441 (CA5), cert. denied *sub nom. Associated Gas Distributors* v. *Austral Oil Co.,* 400 U. S. 950 (1970). It does require, however, the conclusion that Congress rejected the identity between the "true" and the "actual" market price.

The Court is not unresponsive to the special needs of small producers who play a critical role in exploratory efforts in the natural gas industry and ameliorating the supply shortage. The requirements of the Act, however, do not distinguish between small and large producers with respect to just and reasonable rates. Even if the effect of increased small-producer prices would make a small dent in the consumer's pocket, when compared with the rates charged by the large producers, the Act makes unlawful all rates which are not just and reasonable, and does not say a little unlawfulness is permitted. Moreover, there is no finding in the Commission's order as to the actual impact the projected market price increases would have on consumer expenditures for gas, and the Commission is previously on record in its *Permian* decision, as stating: "[T]he impact of small producer prices on consumers is by no means *de minimis* on an area basis, and is of great impact in some situations." 34 F. P. C. 159, 235 (1965).

V

In concluding that the Commission lacks the authority to place exclusive reliance on market prices, we bow to our perception of legislative intent. It may be, as some economists have persuasively argued,[9] that the assumptions of the 1930's about the competitive structure of the natural gas industry, if true then, are no longer true today. It may also be that control of prices in this industry, in a time of shortage, if such there be, is counterproductive to the interests of the consumer in increasing the production of natural gas. It is not the Court's role, however, to overturn congressional assumptions embedded into the framework of regulation established by the Act. This is a proper task for the Legislature where the public interest may be considered from the multifaceted points of view of the representational process.

Attempts have been made in the past to exempt producers from the coverage of the Act, but these attempts have been unsuccessful. The Court realized as much in the *Phillips* case. 347 U. S., at 685, and n. 14. In 1950, Congress had passed a bill, H. R. 1758, 81st Cong., 2d Sess., to exempt gas producers from the Act, but President Truman vetoed the bill stating that "there is a clear possibility that competition will not be effective, at least in some cases, in holding prices to reasonable levels. Accordingly, to remove the authority to regulate, as this bill would do, does not seem to me to be wise public

[9] See C. Hawkins, Structure of the Natural Gas Producing Industry, and P. MacAvoy, The Regulation-Induced Shortage of Natural Gas, in Regulation of the Natural Gas Producing Industry 137–191 (K. Brown ed. 1972). See also Statement of John N. Nassikas, Chairman, Federal Power Commission, Hearing on the Natural Gas Industry before the Subcommittee on Antitrust and Monopoly of the Senate Committee on the Judiciary, 93d Cong., 1st Sess., 43–72 (1973).

policy." The President made this judgment despite the arguments that imposition of price control would discourage exploration and development of new wells. Public Papers of the Presidents, Harry S. Truman, 1950, p. 257 (1965). For the Court to step outside its role in construing this statute, and insert itself into the debate on economics and the public interest, would be an unwarranted intrusion into the legislative forum where the debate again rages on the question of deregulation of natural gas producers.

We do, however, make clear that under the present Act the Commission is free to engage in indirect regulation of small producers by reviewing pipeline costs of purchased gas, providing that it insures that the rates paid by pipelines, and ultimately borne by the consumer, are just and reasonable. It may be, as some of the respondents suggest, that ensuring just and reasonable rates by means of indirect regulation will not be administratively feasible, but this is a matter for the Commission to consider.

We agree with the Court of Appeals that the order of the Commission must be set aside; but for reasons previously stated, we vacate the judgment of the Court of Appeals and remand the cases to that court with instructions to remand the cases to the Commission for further proceedings consistent with this opinion.

Vacated and remanded.

MR. JUSTICE STEWART took no part in the consideration or decision of these cases.

WHEELER ET AL. *v.* BARRERA ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

No. 73–62. Argued January 16, 1974—Decided June 10, 1974

Title I of the Elementary and Secondary Education Act of 1965 (the Act) provides for federal funding of special programs for educationally deprived children in both public and private schools. Respondents, parents of children attending nonpublic schools in Kansas City, Mo., brought this class action, alleging that petitioner state school officials arbitrarily and illegally were approving Title I programs that deprived eligible nonpublic school children of services comparable to those offered eligible public school children, and seeking injunctive and other relief. Petitioners answered that the aid sought by respondents exceeded Title I's requirements and contravened the State's Constitution and state law and public policy. First Amendment issues were also raised. The District Court denied relief. The Court of Appeals reversed and remanded, holding that: petitioners were violating the requirement of the Act and implementing regulations that educationally deprived nonpublic school children be afforded a program comparable to that provided in public schools; if on-the-premises special teaching services are furnished public school children, then comparable programs must be provided nonpublic school children; the state constitutional provision barring use of "public" school funds in private schools did not apply to Title I funds; the question whether Title I funds were "public" within the meaning of the State Constitution was governed by federal law; and, since no plan for on-the-premises instruction in nonpublic schools had yet been implemented, the court would refuse to pass on petitioners' claims that the Establishment Clause of the First Amendment would be violated if Title I does require or permit such instruction. *Held:*

1. At this stage of the proceedings this Court cannot reach and decide whether Title I requires the assignment of publicly employed teachers to provide remedial instruction during regular school hours on the premises of private schools attended by Title I eligible students. Pp. 415–426.

(a) While the Court of Appeals correctly ruled that the District Court erred in denying relief where it clearly appeared that

petitioners had failed to comply with the Act's comparability requirement, the Court of Appeals' opinion is not to be read to the effect that petitioners *must* submit and approve plans that employ the use of Title I teachers on private school premises during regular school hours. P. 415.

(b) That court erred in holding that federal law governed the question whether on-the-premises private school instruction is permissible under Missouri law, since Title I evinces a clear intention that state constitutional spending proscriptions not be preempted as a condition of accepting federal funds. The key issue whether federal aid is money "donated to any state fund for public school purposes" within the meaning of the Missouri Constitution is purely a question of state and not federal law, and by characterizing the problem as one involving "federal" and not "state" funds, and then concluding that federal law governs, the Court of Appeals in effect nullified the Act's policy of accommodating state law. Pp. 415–419.

(c) It was unnecessary for the Court of Appeals to reach the issue whether on-the-premises nonpublic school instruction is permissible under state law, since in view of the fact that Title I does not obligate the State to provide such instruction but only to provide "comparable" (not identical) services, the illegality of such instruction under state law would not provide a defense to respondents' charge of noncompliance with Title I. Pp. 419–420.

(d) On remand, petitioners and the local school agency have the option to provide for on-the-premises instruction for nonpublic school children, but if they do not choose this method or if it turns out that state law prevents its use, then the following options remain: (1) they may approve a plan that does not utilize nonpublic school on-the-premises instruction but that still complies with the Act's comparability requirement; (2) they may submit a plan that eliminates on-the-premises instruction in public schools and may resort, instead, to other means, such as neutral sites or summer programs; or (3) they may choose not to participate at all in the Title I program. Pp. 421–426.

2. The Court of Appeals properly declined to pass on the First Amendment issue, since, no order requiring on-the-premises nonpublic school instruction having been entered, the matter was not ripe for review. Pp. 426–427.

3. While under the Act respondents are entitled to comparable services and therefore to relief, they are not entitled to any particular form of service, and it is the role of state and local agencies,

not of the federal courts, at least at this stage, to formulate a suitable plan. Pp. 427–428.

475 F. 2d 1338, affirmed.

BLACKMUN, J., delivered the opinion of the Court, in which BURGER, C. J., and BRENNAN, STEWART, POWELL, and REHNQUIST, JJ., joined. POWELL, J., filed a concurring opinion, *post*, p. 428. WHITE, J., filed an opinion concurring in the judgment, *post*, p. 428. MARSHALL, J., concurred in the result. DOUGLAS, J., filed a dissenting opinion, *post*, p. 429.

Leo Pfeffer argued the cause for petitioners. With him on the briefs were *Harry D. Dingman* and *James B. Lowe.*

Thomas M. Sullivan argued the cause for respondents. With him on the brief were *Edward L. Fitzgerald* and *Louis C. DeFeo, Jr.*

Deputy Solicitor General Friedman argued the cause for the United States as *amicus curiae* urging affirmance. With him on the brief were *Solicitor General Bork, Acting Assistant Attorney General Jaffe, Danny J. Boggs, Morton Hollander, John B. Rhinelander, Harry J. Chernock,* and *William A. Kaplin.**

**Kenneth W. Greenawalt, Melvin L. Wulf,* and *Walter Wright* filed a brief for the American Civil Liberties Union et al. as *amici curiae* urging reversal.

Briefs of *amici curiae* urging affirmance were filed by *William R. Consedine, George E. Reed, Charles M. Whelan,* and *Alfred L. Scanlan* for the United States Catholic Conference; by *William B. Ball* and *Joseph G. Skelly* for the Catholic League for Religious and Civil Rights et al.; by *Nathan Lewin* for the National Jewish Commission on Law and Public Affairs; and by *James P. Finnegan, Jr.,* for Parents Rights, Inc., et al.

Briefs of *amici curiae* were filed by *Paul S. Berger, Theodore R. Mann, Larry M. Lavinsky, Henry N. Rapaport,* and *Joseph B. Robison* of the American Jewish Congress et al., and by *G. Dennis Sullivan* for the Missouri Coalition for Public Education and Religious Liberty.

MR. JUSTICE BLACKMUN delivered the opinion of the Court.

Title I of the Elementary and Secondary Education Act of 1965, as amended, 20 U. S. C. § 241a *et seq.*, provides for federal funding of special programs for educationally deprived children in both public and private schools.

This suit was instituted on behalf of parochial school students who were eligible for Title I benefits and who claimed that the public school authorities in their area, in violation of the Act, failed to provide adequate Title I programs for private school children as compared with those programs provided for public school children. The defendants answered that the extensive aid sought by the plaintiffs exceeded the requirements of Title I and contravened the State's Constitution and state law and public policy. First Amendment rights were also raised by the parties. The District Court, concluding that the State had fulfilled its Title I obligations, denied relief. The United States Court of Appeals for the Eighth Circuit, by a divided vote, reversed. 475 F. 2d 1338 (1973). We granted certiorari to examine serious questions that appeared to be present as to the scope and constitutionality of Title I. 414 U. S. 908 (1973).

I

Title I is the first federal-aid-to-education program authorizing assistance for private school children as well as for public school children. The Congress, by its statutory declaration of policy,[1] and otherwise, recognized

[1] "In recognition of the special educational needs of children of low-income families and the impact that concentrations of low-income families have on the ability of local educational agencies to support adequate educational programs, the Congress hereby declares it to be the policy of the United States to provide financial

that all children from educationally deprived areas do not necessarily attend the public schools, and that, since the legislative aim was to provide needed assistance to educationally deprived *children* rather than to specific schools, it was necessary to include eligible private school children among the beneficiaries of the Act.[2]

Since the Act was designed to be administered by local *public* education officials,[3] a number of problems naturally arise in the delivery of services to eligible private school pupils. Under the administrative structure envisioned by the Act, the primary responsibility for designing and effectuating a Title I program rests with what the Act and the implementing regulations describe as the "local edu-

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assistance (as set forth in the following parts of this subchapter) to local educational agencies serving areas with concentrations of children from low-income families to expand and improve their educational programs by various means (including preschool programs) which contribute particularly to meeting the special educational needs of educationally deprived children." 20 U. S. C. § 241a.

[2] The implementing regulations, 45 CFR § 116.1, set forth a number of definitions, some in common with, and others in addition to, the definitions contained in the Act itself, 20 U. S. C. § 244. They draw no distinction between public and nonpublic school children. Specifically:

" 'Educationally deprived children' means those children who have need for special educational assistance in order that their level of educational attainment may be raised to that appropriate for children of their age. The term includes children who are handicapped or whose needs for such special educational assistance result from poverty, neglect, delinquency, or cultural or linguistic isolation from the community at large." 45 CFR § 116.1 (i).

[3] In order for a local Title I proposal to be approved and a grant received, the local agency must give

"satisfactory assurance that the control of funds provided under this subchapter, and title to property derived therefrom, shall be in a public agency for the uses and purposes provided in this subchapter, and that a public agency will administer such funds and property." 20 U. S. C. § 241e (a) (3).

cational agency." [4] This local agency submits to the "State educational agency" [5] a proposed program designed to meet the special educational needs of educationally deprived children in school attendance areas with high concentrations of children from low-income families. The state agency then must approve the local plan and, in turn, forward the approved proposal to the United States Commissioner of Education, who has the ultimate responsibility for administering the program and dispensing the appropriated and allocated funds. In order to receive state approval, the proposed plan, among other requirements, must be designed to provide the eligible private school students services that are "comparable in quality, scope, and opportunity for participation to those provided for public school children with needs of equally high priority." United States Office of Education (USOE) Program Guide No. 44, ¶ 4.5 (1968),[6] repro-

[4] "[T]he term 'local educational agency' means a public board of education or other public authority legally constituted within a State for either administrative control or direction of, or to perform a service function for, public elementary or secondary schools in a city, county, township, school district, or other political subdivision of a State, or such combination of school districts or counties as are recognized in a State as an administrative agency for its public elementary or secondary schools. Such term includes any other public institution or agency having administrative control and direction of a public elementary or secondary school . . . ." 20 U. S. C. § 244 (6)(B). See also 45 CFR § 116.1 (r).

[5] "The term 'State educational agency' means the officer or agency primarily responsible for the State supervision of public elementary and secondary schools." 20 U. S. C. § 244 (7). See also 45 CFR § 116.1 (aa).

[6] The regulations state:

"Each local education agency shall provide special educational services designed to meet the special educational needs of educationally deprived children residing in its district who are enrolled in private schools. Such educationally deprived children shall be

duced in Title I ESEA, Participation of Private School Children—A Handbook for State and Local School Officials, U. S. Dept. of Health, Education, and Welfare, Publication No. (OE) 72–62, p. 41 (1971) (hereinafter referred to as the Handbook).

The questions that arise in this case concern the scope of the State's duty to insure that a program submitted by a local agency under Title I provides "comparable" services for eligible private school children.

II

Plaintiff-respondents are parents of minor children attending elementary and secondary nonpublic schools in the inner city area of Kansas City, Missouri. They instituted this class action in the United States District Court for the Western District of Missouri on behalf of themselves and their children, and others similarly situated, alleging that the defendant-petitioners, the then State Commissioner of Education and the members of the Missouri Board of Education, arbitrarily and illegally were approving Title I programs that deprived eligible nonpublic school children of services comparable to those offered eligible public school children. The complaint sought an injunction restraining continued violations of the Act and an accounting and restoration of some

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provided genuine opportunities to participate therein consistent with the number of such educationally deprived children and the nature and extent of their educational deprivation." 45 CFR § 116.19 (a).

"The needs of educationally deprived children enrolled in private schools, the number of such children who will participate in the program and the types of special educational services to be provided for them, shall be determined, after consultation with persons knowledgeable of the needs of these private school children, on a basis comparable to that used in providing for the participation in the program by educationally deprived children enrolled in public schools." 45 CFR § 116.19 (b).

$13,000,000 in Title I funds allegedly misapplied from 1966 to 1969.

The District Court initially dismissed the complaint on the alternative grounds of failure to exhaust state remedies and abstention. The Court of Appeals reversed this dismissal and remanded the case for trial. 441 F. 2d 795 (CA8 1971). It observed: "[W]e indicate no opinion on the merits of the alleged noncompliance by the state officials." *Id.*, at 801.

On remand, the District Court found that while most of the Title I funds allocated to public schools in Missouri were used "to employ teachers to instruct in remedial subjects," the petitioners had refused "to approve any applications allocating money for teachers in parochial schools during regular school hours." Pet. for Cert. A40. The court did find that petitioners in some instances had approved the use of Title I money "to provide mobile educational services and equipment, visual aids, and educational radio and television in parochial schools. Teachers for after-school classes, weekend classes, and summer school classes, all open to parochial school pupils, have all been approved." *Id.*, at A40–A41.

In what perhaps may be described as something less than full cooperation by both sides, the possibility of providing "comparable" services was apparently frustrated by the fact that many parochial schools would accept only services in the form of assignment of federally funded Title I teachers to teach in those schools during regular school hours. At the same time, the petitioners refused to approve any program providing for on-the-premises instruction on the grounds that it was forbidden under both Missouri law and the First Amendment and, furthermore, that Title I did not require it. Since the larger portion (over 65%) of Title I funds

allocated to Missouri has been used to provide personnel for remedial instruction, the effect of this stalemate is that substantially less money per pupil has been expended for eligible students in private schools, and that the services provided in those schools in no sense can be considered "comparable." [7]

Faced with this situation, the District Court recognized that "[t]his head-on conflict . . . has resulted in an undoubtedly inequitable expenditure of Title I funds between educationally deprived children in public and nonpublic schools in some local school districts in the state." *Id.*, at A41.

Nonetheless, the District Court denied relief. It reasoned that since the petitioners were under no statutory obligation to provide on-the-premises nonpublic school instruction, the failure to provide that instruction could not violate the Act. The court further reasoned that

[7] The Court of Appeals noted:

"The practice in Missouri as a whole in prior years has been to give comparable equipment, materials and supplies to eligible private school children, but to exclude any sharing whatsoever of personnel services. Most Title I public school programs in Missouri involve remedial reading, speech therapy and special mathematics classes, thus the largest proportion of the cost of these projects involves salaries for teachers and teacher aids. After the first two years of Title I, expenditures in Missouri for instructional personnel have run from 65 per cent to 70 per cent of the total grant. The remaining funds are used for equipment and materials, health and counseling services, transportation, and plant maintenance. One difficulty with providing only equipment and materials is that even minimal sharing of expenses for equipment and materials soon reaches a saturation point; in fact, the state guidelines permit only 15 per cent of any appropriation to be spent on equipment and instructional materials. The result of this plan for the deprived private school child has been to create a disparity in expenditures in many school districts ranging from approximately $10 to $85 approved for the educationally disadvantaged private school child to approximately $210 to $275 allocated for the deprived public school child." 475 F. 2d 1338, 1345.

since the petitioners apparently had approved all programs "except those requesting salaried teachers in the nonpublic schools," *id.*, at A43, they had fulfilled their commitment. The court did not directly consider whether programs in effect without on-the-premises private school instruction complied with the comparability requirement despite gross disparity in the services delivered.

The Court of Appeals reversed. It traced the legislative history of Title I, examined the language of the statute and the regulations, and noted "that the Act and the regulations require a program for educationally deprived non-public school children that is comparable in quality, scope and opportunity, which may or may not necessarily be equal in dollar expenditures to that provided in the public schools." 475 F. 2d, at 1344. The court then observed that the Act does not mandate that services take any particular form and that, within the confines of the comparability requirement, the Act left to the state and local agencies the task of designing a program best suited to meet the particularized needs of both the public school children and the nonpublic school children in the area. After reviewing the unique situation existing in Missouri, where funds were grossly malapportioned due to the refusal to employ either dual enrollment or Title I teachers on private school premises,[8] the court concluded that the petitioners were in violation of the comparability requirement:

> "Thus, we find that when the need of educationally disadvantaged children requires it, Title I authorizes

[8] An informal survey conducted by the United States Office of Education revealed that Missouri was the only State which did not use either dual enrollment or on-the-premises private school instruction as a means of providing Title I services. Brief for Respondents 93–95.

> special teaching services, as contemplated within the Act and regulations, to be furnished by the public agency on private as well as public school premises. In other words, we think it clear that the Act demands that if such special services are furnished public school children, then comparable programs, if needed, must be provided the disadvantaged private school child." *Id.*, at 1353.

In response to petitioners' argument that Missouri law forbids sending public school teachers into private schools, the court held that the state constitutional provision barring use of "public" school funds in private schools had no application to Title I funds. The court reasoned that although the Act was generally to be accommodated to state law, the question whether Title I funds were "public," within the meaning of the Missouri Constitution,[9]

[9] The Missouri Constitution, Art. 9, § 5, provides:

"The proceeds of all certificates of indebtedness due the state school fund, and all moneys, bonds, lands, and other property belonging to or donated to any state fund for public school purposes, and the net proceeds of all sales of lands and other property and effects that may accrue to the state by escheat, shall be paid into the state treasury, and securely invested under the supervision of the state board of education, and sacredly preserved as a public school fund the annual income of which *shall be faithfully appropriated for establishing and maintaining free public schools, and for no other uses or purposes whatsoever.*" (Emphasis supplied.)

The Constitution, Art. 9, § 8, also provides:

"Neither the general assembly, nor any county, city, town, township, school district or other municipal corporation, shall ever make an appropriation or pay from any public fund whatever, anything in aid of any religious creed, church or sectarian purpose, or to help to support or sustain any private or public school, academy, seminary, college, university, or other institution of learning controlled by any religious creed, church or sectarian denomination whatever; nor shall any grant or donation of personal property or real estate ever be made by the state, or any county, city, town, or other

must necessarily be decided by federal law. *Id.*, at 1351–1353. Finally, the court refused to pass on petitioners' claim that the Establishment Clause of the First Amend-

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municipal corporation, for any religious creed, church, or sectarian purpose whatever."

Finally, the Constitution's Bill of Rights, Art. 1, § 7, provides:

"That no money shall ever be taken from the public treasury, directly or indirectly, in aid of any church, sect or denomination of religion, or in aid of any priest, preacher, minister or teacher thereof, as such; and that no preference shall be given to nor any discrimination made against any church, sect or creed of religion, or any form of religious faith or worship."

In *Special District* v. *Wheeler*, 408 S. W. 2d 60, 63 (1966), the Supreme Court of Missouri held that "the use of public school moneys to send speech teachers . . . into the parochial schools for speech therapy" was not a use "for the purpose of maintaining free public schools," within the meaning of Art. 9, § 5, of the State's Constitution, and therefore was a practice "unlawful and invalid." That case did not involve federal funds.

The question in the present case is whether Title I grants to the State are "donated . . . for public school purposes" and therefore subject to the proscription held to exist in *Special District*. After that case was decided by the Missouri court, the State Board of Education promulgated a regulation governing the use of Title I funds in Missouri. It provides:

" 'Special educational services and arrangements, including broadened instructional offerings made available to children in private schools, shall be provided at public facilities. Public school personnel shall not be made available in private facilities. This does not prevent the inclusion in a project of special educational arrangements to provide educational radio and television to students at private schools.' " See 475 F. 2d, at 1350.

In a formal opinion the Attorney General of Missouri has taken the opposing view, stating: "We do not believe that an appropriation of this type [Title I] converts federal aid into state aid, thereby making it subject to the Missouri constitutional provisions." The opinion concludes:

"It is the opinion of this office that the Elementary and Secondary Education Act of 1965 provides that, under certain circumstances

ment would be violated if Title I, in fact, does require or permit service by public school teachers on private school premises. The reason stated for the court's refusal was that since no plan had yet been implemented, the court "must refrain from passing upon important constitutional questions on an abstract or hypothetical basis." *Id.*, at 1354.

The dissent argued that although Title I permits the assignment of Title I teachers to nonpublic schools, it does not mandate that assignment, and that if the Act is to be read as embracing such a mandate, it would present substantial First Amendment problems that could not be avoided. *Id.*, at 1358–1359.[10]

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and to the extent necessary, public school personnel, paid with federal funds pursuant to this program, may be made available on the premises of private schools to provide certain special services to eligible children and that Missouri law would not prevent public school personnel, paid with federal funds, from providing these services on the premises of a private school." Op. Atty. Gen. No. 26 (1970).

This rather fundamental intrastate legal rift apparently has resulted in the Missouri Attorney General's nonappearance for the petitioners in the present litigation.

There is no Missouri case in point. Cf. *State ex rel. School District of Hartington* v. *Nebraska State Board of Education*, 188 Neb. 1, 195 N. W. 2d 161, cert. denied, 409 U. S. 921 (1972).

[10] On remand from the Court of Appeals the District Court on May 9, 1973, entered an "Injunction and Judgment Issued in Compliance with Mandate" requiring use of Title I personnel on private school premises during regular school hours if such personnel are also used in public schools during regular school hours. Pet. for Cert. A45–A47. Petitioners appealed from that judgment, but the Court of Appeals dismissed the appeal as moot after we granted certiorari. Our grant of certiorari was to review the judgment of the Court of Appeals entered pursuant to the opinion reported at 475 F. 2d 1338. The judgment of the District Court on remand is not presently before us.

III

In this Court the parties are at odds over two issues: First, whether on this record Title I requires the assignment of publicly employed teachers to provide remedial instruction during regular school hours on the premises of private schools attended by Title I eligible students, and, second, whether that requirement, if it exists, contravenes the First Amendment. We conclude that we cannot reach and decide either issue at this stage of the proceedings.

A. *Title I requirements.* As the case was presented to the District Court, petitioners clearly had failed to meet their statutory commitment to provide comparable services [11] to children in nonpublic schools. The services provided to the class of children represented by respondents were plainly inferior, both qualitatively and quantitatively, and the Court of Appeals was correct in ruling that the District Court erred in refusing to order relief. But the opinion of the Court of Appeals is not to be read to the effect that petitioners *must* submit and approve plans that employ the use of Title I teachers on private school premises during regular school hours.

The legislative history, the language of the Act, and

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[11] The Act itself does not mention "comparability." It requires only that the state agency, in approving a plan, must determine "that, to the extent consistent with the number of educationally deprived children in the school district of the local educational agency who are enrolled in private elementary and secondary schools, such agency has made provision for including special educational services and arrangements (such as dual enrollment, educational radio and television, and mobile educational services and equipment) in which such children can participate." 20 U. S. C. § 241e (a)(2). The regulations, 45 CFR §§ 116.19 (a) and (b), are the source of the comparability requirement. See n. 6, *supra*.

the regulations clearly reveal the intent of Congress to place plenary responsibility in local and state agencies for the formulation of suitable programs under the Act. There was a pronounced aversion in Congress to "federalization" of local educational decisions.

> "It is the intention of the proposed legislation not to prescribe the specific types of programs or projects that will be required in school districts. Rather, such matters are left to the discretion and judgment of the local public educational agencies since educational needs and requirements for strengthening educational opportunities for educationally deprived elementary and secondary school pupils will vary from State to State and district to district." H. R. Rep. No. 143, 89th Cong., 1st Sess., 5 (1965); S. Rep. No. 146, 89th Cong., 1st Sess., 9 (1965).

And 20 U. S. C. § 1232a provides, *inter alia:*

> "No provision of . . . the Elementary and Secondary Education Act of 1965 . . . shall be construed to authorize any department, agency, officer, or employee of the United States to exercise any direction, supervision, or control over the curriculum, program of instruction, administration, or personnel of any educational institution, school, or school system . . . ."

Although this concern was directed primarily at the possibility of HEW's assuming the role of a national school board, it has equal application to the possibility of a federal court's playing an overly active role in supervising the manner of Title I expenditures.

At the outset, we believe that the Court of Appeals erred in holding that federal law governed the question whether on-the-premises private school instruction is permissible under Missouri law. Whatever the case might be if there were no expression of specific congres-

sional intent,[12] Title I evinces a clear intention that state constitutional spending proscriptions not be pre-empted as a condition of accepting federal funds.[13] The key issue,

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[12] The case from this Court primarily cited by the Court of Appeals for the proposition that federal, not state, law should govern, is *United States* v. *93.970 Acres of Land*, 360 U. S. 328 (1959). There, however, this Court said:

"We have often held that where essential interests of the Federal Government are concerned, federal law rules unless Congress chooses to make state laws applicable. It is apparent that no such choice has been made here." *Id.*, at 332–333 (footnotes omitted).

In the present case, Congress, in fact, has made this choice, see n. 13, *infra*, and thus the cited case is not controlling.

[13] During the debates in the House, it was generally understood that state constitutional limitations were to be accommodated. For example, at one point Congressman Goodell raised the possibility that state law would preclude certain forms of services to nonpublic schools. The response from Congressman Perkins, Chairman of the Subcommittee, was:

"The gentleman is an able lawyer and he well knows you cannot do anything in this bill that you cannot do under the State law." 111 Cong. Rec. 5744 (1965).

Responding to a later observation by Mr. Goodell that dual enrollment was prohibited by 28 States, Congressman Carey responded:

"The prohibition applies to a single type of program. That is why we have a multiplicity of programs in this, so that they can choose one in helping the children who are disadvantaged in any one public school." *Id.*, at 5758.

Congressman Thompson subsequently observed:

"Therefore, the provision about providing full assistance under title I is up to the public school district, subject to the laws of the States." *Ibid.*

See also *id.*, at 5979 (remarks of Cong. Thompson); *id.*, at 5757 (remarks of Cong. Goodell); *id.*, at 5747 (remarks of Cong. Perkins).

The Handbook clearly recognizes that state law is to be accommodated:

"Many State departments of education found severe restrictions with respect to the kind of services that their respective State

namely, whether federal aid is money "donated to any state fund for public school purposes," within the meaning of the Missouri Constitution, Art. 9, § 5, is purely a ques-

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constitutions and statutes allowed them to provide to private school students, especially when those private schools were owned and operated by religious groups.

"The following list illustrates the kind of prohibitions encountered when State constitutions and laws are applied to Title I. The list is not exhaustive.

"* Dual enrollment may not be allowed.

"* Public school personnel may not perform services on private school premises.

"* Equipment may not be loaned for use on private school premises.

"* Books may not be loaned for use on private school premises.

"* Transportation may not be provided to private school students.

"Sometimes such prohibitions exist singly in a given State. Often, the prohibitions exist in combination.

"When ESEA was passed in 1965, each State submitted an assurance to the U. S. Office of Education in which the State department of education stated its intention to comply with Title I and its regulations, and the State attorney general declared that the State board of education had the authority, under State law, to perform the duties and functions of Title I as required by the Federal law and its regulations. While State constitutions, laws, and their interpretations limit the options available to provide services to private school students, this fact, in itself, does not relieve the State educational agency of its responsibility to approve only those Title I applications which meet the requirements set forth in the Federal law and regulations.

"A number of school officials realized that they could not submit the required assurance because of the restrictions applying to private school students which were operative in their States. The impasse was sucessfully [*sic*] resolved in one case by a State attorney general's opinion which held that State restrictions were not applicable to 100 percent federally financed programs.

"Other States have proposed legislation which would allow the SEA to administer Title I according to the Federal requirements. Still others have applied the restrictions of the State to Title I and have relied upon the initiative of school administrators to develop

tion of state and not federal law. By characterizing the problem as one involving "federal" and not "state" funds, and then concluding that federal law governs, the Court of Appeals, we feel, in effect nullified the Act's policy of accommodating state law. The correct rule is that the "federal law" under Title I is to the effect that state law should not be disturbed. If it is determined, ultimately, that the petitioners' position is a correct exposition of Missouri law, Title I requires, not that that law be pre-empted, but, rather, that it be accommodated by the use of services not proscribed under state law. The question whether Missouri law prohibits the use of Title I funds for on-the-premises private school instruction is still unresolved. See n. 9, *supra.*

Furthermore, in the present posture of this case, it was unnecessary for the federal court even to reach the issue whether on-the-premises parochial school instruction is permissible under state law. The state-law question appeared in the case by way of petitioners' defense that it could not provide on-the-premises services because it was prohibited by the State's Constitution. But, as is discussed more fully below, the State is not obligated by Title I to provide on-the-premises instruction. The mandate is to provide "comparable" services. Assuming, *arguendo,* that state law does prohibit on-the-premises instruction, this would not provide a defense to respondents' complaint that comparable services are not being provided. The choice of programs is left to the State with the proviso that comparable (not identical) programs are also made available to eligible private school children. If one form of services to parochial school children is rendered unavailable because of state constitutional proscriptions, the solution is to employ an

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a program that would meet the Federal requirements." Handbook 19–20.

acceptable alternative form. In short, since the illegality under state law of on-the-premises instruction would not provide a defense to respondents' charge of noncompliance with Title I, there was no reason for the Court of Appeals to reach this issue. By deciding that on-the-premises instruction was not barred by state law, the court in effect issued an advisory opinion. Even apart from traditional policies of abstention and comity, it was unnecessary to decide this question in the current posture of the case.

The Court of Appeals properly recognized, as we have noted, that petitioners failed to meet their broad obligation and commitment under the Act to provide comparable programs.[14] "Comparable," however, does not mean "identical," and, contrary to the assertions of both sides, we do not read the Court of Appeals' opinion or, for that

[14] HEW's Office of Education refers to the comparability requirement as follows:

"The needs of private school children in the eligible areas may require different services and activities. Those services and activities, however, must be comparable in quality, scope, and opportunity for participation to those provided for public school children with needs of equally high priority. 'Comparability' of services should be attained in terms of the numbers of educationally deprived children in the project area in both public and private schools and related to their specific needs, which in turn should produce an equitable sharing of Title I resources by both groups of children." USOE Program Guide No. 44, ¶ 4.5 (1968), in Handbook 41–42. See 45 CFR § 116.18 (a).

Title 45 CFR § 116.19 (c) provides:

"The opportunities for participation by educationally deprived children in private schools in the program of a local educational agency under Title I of the Act shall be provided through projects of the local educational agency which furnish special educational services that meet the special educational needs of such educationally deprived children rather than the needs of the student body at large or of children in a specified grade."

See also Handbook 1, 10–11.

matter, the Act itself, as ever requiring that identical services be provided in nonpublic schools.[15] Congress recognized that the needs of educationally deprived children attending nonpublic schools might be different from those of similar children in public schools; it was also recognized that in some States certain programs for private and parochial schools would be legally impossible because of state constitutional restrictions, most notably in the church-state area. See n. 9, *supra*.[16] Title I was not intended to override these individualized state restrictions. Rather, there was a clear intention that the assistance programs be designed on local levels so as to accommodate the restrictions.

Inasmuch as comparable, and not identical, services are required, the mere fact that public school children are provided on-the-premises Title I instruction does not necessarily create an obligation to make identical pro-

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[15] The Handbook 6, referring to the "comparability" definition in n. 14, *supra*, states:

"Basically, what the regulations and guidelines are saying is this: When a group of children in a private school are found to have a need which is similar (not identical) to a need found in a group of public school children, the response to that need with Title I resources should be similar (not identical) in scope, quality, and opportunity for participation for both groups."

[16] The United States, as *amicus curiae*, states:

"Title I is sufficiently flexible to allow local agencies to observe, where possible, state and local restrictions upon aid to private school children (*e. g.*, prohibition against dual enrollment). Accordingly, Title I programs may be provided in a different manner to private and to public school children. For example, remedial services for private school students might be provided outside their regular classroom, while being provided in the regular classroom for public school students. In addition, the content of the services could differ if the 'special educational needs' required to be met under 20 U. S. C. [§] 241e (a)(1)(A) of the two groups differ." Brief for the United States as *Amicus Curiae* 10 (footnote omitted).

vision for private school children.[17] Congress expressly recognized that different and unique problems and needs might make it appropriate to utilize different programs in the private schools. A requirement of identity would run directly counter to this recognition. It was anticipated, to be sure, that one of the options open to the local agency in designing a suitable program for private school children was the provision of on-the-premises instruction,[18] and on remand this is an option open to

[17] The State, of course, may not utilize the "comparability" provision so as to provide an inferior program. A year after the Act was passed, the House Committee on Education and Labor issued a Supplemental Report stating:

"While the committee and the Council have emphasized the importance of adherence to constitutional safeguards, the committee does not expect that such considerations will be simply a device by which only a token communication with private school administrators is extended, or worse yet, by which the projects in which private schoolchildren can participate are inconvenient, awkwardly arranged, or poorly conceived. To the contrary, it is expected that earnest efforts will be made to ascertain from private school administrators an accurate appraisal of underachievement and other special needs of educationally disadvantaged children who do not attend the public schools. Projects for such children should be so designed as to effectively eliminate those factors which preclude the educationally deprived child from gaining full benefit from the regular academic program offerings in the private institution in which he or she may be enrolled." H. R. Rep. No. 1814, pt. 2, 89th Cong., 2d Sess., 3 (1966).

[18] The Senate Report outlined the circumstances in which this type of service would be appropriate:

"It is anticipated, however, that public school teachers will be made available to other than public school facilities only to provide specialized services which contribute particularly to meeting the special educational needs of educationally deprived children (such as therapeutic, remedial or welfare services) and only where such specialized services are not normally provided by the nonpublic school." S. Rep. No. 146, 89th Cong., 1st Sess., 12 (1965). See 45 CFR § 116.19 (e); 111 Cong. Rec. 5747 (1965) (remarks of Congs. Perkins and Carey).

these petitioners and the local agency. If, however, petitioners choose not to pursue this method, or if it turns out that state law prevents its use, three broad options still remain:

First, the State may approve plans that do not utilize on-the-premises private school Title I instruction but, nonetheless, still measure up to the requirement of comparability. Respondents appear to be arguing here that it is impossible to provide "comparable" services if the public schools receive on-the-premises Title I instruction while private school children are reached in an alternative method. In support of their position, respondents argue: "The most effective type of services is that provided by a teacher or other specialist during regular school hours. There is nothing comparable to the services of personnel except the services of personnel." Brief for Respondents 49. In essence, respondents are asking this Court to hold, as a matter of federal law, that one mode of delivering remedial Title I services is superior to others. To place on this Court, or on any federal court, the responsibility of ruling on the relative merits of various possible Title I programs seriously misreads the clear intent of Congress to leave decisions of that kind to the local and state agencies. It is unthinkable, both in terms of the legislative history and the basic structure of the federal judiciary, that the courts be given the function of measuring the comparative desirability of various pedagogical methods contemplated by the Act.

In light of the uncontested statutory proscription in Missouri against dual enrollment, it may well be a significant challenge to these petitioners and the local agencies in their State to devise plans that utilize on-the-premises public school instruction and, at the same time, forgo on-the-premises private school instruction. We cannot say, however, that this is an impossibility; by relying upon "the initiative of school administrators to

develop a program that would meet the Federal [comparability] requirements," Handbook 20, it may well be possible to develop and submit an acceptable plan under Title I.

Of course, the cooperation and assistance of the officials of the private school are obviously expected and required in order to design a program that is suitable for the private school. It is clear, however, that the Act places ultimate responsibility and control with the public agency, and the overall program is not to be defeated simply because the private school refuses to participate unless the aid is offered in the particular form it requests. The private school may refuse to participate if the local program does not meet with its approval. But the result of this would then be that the private school's eligible children, the direct and intended beneficiaries of the Act, would lose. The Act, however, does not give the private school a veto power over the program selected by the local agency.[19]

In sum, although it may be difficult, it is not impossible under the Act to devise and implement a legal local Title I program with comparable services despite the use of on-the-premises instruction in the public schools but not in the private schools. On the facts of this case, petitioners have been approving plans that do not meet this requirement, and certainly, if public school children continue to receive on-the-premises Title I instruction, petitioners should not approve plans that fail to make a genuine effort to employ comparable alternative programs that make up for the lack of on-the-premises instruction for the nonpublic school children. A program which provides instruction and equipment to the public school

[19] "There are no easy solutions to the logistical problems. However, when the legal situation allows several options and good will exists between public and private school representatives, the logistical problem can be solved or reasonably reduced." Handbook 23.

children and the same equipment but no instruction to the private school children cannot, on its face, be comparable. In order to equalize the level and quality of services offered, something must be substituted for the private school children. The alternatives are numerous.[20] Providing nothing to fill the gap, however, is not among the acceptable alternatives.

Second, if the State is unwilling or unable to develop a plan which is comparable, while using Title I teachers in public but not in private schools, it may develop and submit an acceptable plan which eliminates the use of on-the-premises instruction in the public schools and, instead, resorts to other means, such as neutral sites or summer programs that are less likely to give rise to the gross disparity present in this case.

Third, and undoubtedly least attractive for the educationally deprived children, is nonparticipation in the program. Indeed, under the Act, the Commissioner, subject to judicial review, 20 U. S. C. § 241k, may refuse to provide funds if the State does not make a bona fide effort

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[20] A listing of possible programs suggested to the Senate Committee appears in S. Rep. No. 146, 89th Cong., 1st Sess., 10–11 (1965). Among the examples there listed are teacher aids and instructional secretaries; institutes for training teachers in special skills; supplementary instructional materials; curriculum materials center for disadvantaged children; preschool training programs; remedial programs, especially in reading and mathematics; enrichment programs on Saturday morning and during summer; instructional media centers to provide modern equipment and materials; programs for the early identification and prevention of dropouts; home and school visitors and social workers; supplemental health and food services; classrooms equipped for television and radio instruction; mobile learning centers; educational summer camps; summer school and day camps; shop and library facilities available after regular school hours; work experience programs; Saturday morning special opportunity classes; home oriented bookmobiles; afterschool study centers; and pupil exchange programs.

to formulate programs with comparable services. 20 U. S. C. § 241j.

B. *First Amendment.* The second major issue is whether the Establishment Clause of the First Amendment prohibits Missouri from sending public school teachers paid with Title I funds into parochial schools to teach remedial courses. The Court of Appeals declined to pass on this significant issue, noting that since no order had been entered requiring on-the-premises parochial school instruction, the matter was not ripe for review. We agree. As has been pointed out above, it is possible for the petitioners to comply with Title I without utilizing on-the-premises parochial school instruction. Moreover, even if, on remand, the state and local agencies do exercise their discretion in favor of such instruction, the range of possibilities is a broad one and the First Amendment implications may vary according to the precise contours of the plan that is formulated. For example, a program whereby a former parochial school teacher is paid with Title I funds to teach full time in a parochial school undoubtedly would present quite different problems than if a public school teacher, solely under public control, is sent into a parochial school to teach special remedial courses a few hours a week. At this time we intimate no view as to the Establishment Clause effect of any particular program.

The task of deciding when the Establishment Clause is implicated in the context of parochial school aid has proved to be a delicate one for the Court. Usually it requires a careful evaluation of the facts of the particular case. See, *e. g., Lemon* v. *Kurtzman,* 403 U. S. 602 (1971), and *Tilton* v. *Richardson,* 403 U. S. 672 (1971). It would be wholly inappropriate for us to attempt to render an opinion on the First Amendment issue when no specific plan is before us. A federal court does not sit to

render a decision on hypothetical facts, and the Court of Appeals was correct in so concluding.

The Court of Appeals disposed of the case as follows:

> "The case is remanded to the district court with directions to enjoin the defendants from further violation of Title I of ESEA, and it is further ordered that the court retain continuing jurisdiction of the litigation for the purpose of requiring, within reasonable time limits, the imposition and application of guidelines which will comport with Title I and its regulations. Such guidelines must provide the lawful means and machinery for effectively assuring educationally disadvantaged non-public school children in Missouri participation in a meaningful program as contemplated within the Act which is comparable in size, scope and opportunity to that provided eligible public school children. Such guidelines shall be incorporated into an appropriate injunctive decree by the district court." 475 F. 2d, at 1355–1356 (footnotes omitted).

We affirm this disposition with the understanding that petitioners will be given the opportunity to submit guidelines insuring that only those projects that comply with the Act's requirements and this opinion will be approved and submitted to the Commission. It is also to be understood that the District Court's function is not to decide which method is best, or to order that a specific form of service be provided. Rather, the District Court is simply to assure that the state and local agencies fulfill their part of the Title I contract if they choose to accept Title I funds. Cf. *Lau* v. *Nichols*, 414 U. S. 563 (1974). The comparability mandate is a broad one, and in order to implement the overriding concern with localized control of Title I programs, the District Court should make every effort to defer to the judgment of the petitioners and of

the local agency. Under the Act, respondents are entitled to comparable services, and they are, therefore, entitled to relief. As we have stated repeatedly herein, they are not entitled to any particular form of service, and it is the role of the state and local agencies, and not of the federal courts, at least at this stage, to formulate a suitable plan.

On this basis, the judgment of the Court of Appeals is affirmed.

It is so ordered.

MR. JUSTICE MARSHALL concurs in the result.

MR. JUSTICE POWELL, concurring.

The Court holds that under Title I of the Elementary and Secondary Education Act of 1965, as amended, 20 U. S. C. § 241a *et seq.*, federal courts may not ignore state-law prohibitions against the use of publicly employed teachers in private schools, *ante*, at 416–417, that Title I does not mandate on-the-premises instruction in private schools, *ante*, at 419, and that Title I does not require that the services to be provided in private schools be identical in all respects to those offered in public schools. *Ante*, at 420–421. It is thus unnecessary to decide whether the assignment of publicly employed teachers to provide instruction in sectarian schools would contravene the Establishment Clause of the First Amendment. *Ante*, at 415. On that basis, I join the Court's opinion. I would have serious misgivings about the constitutionality of a statute that required the utilization of public school teachers in sectarian schools. See *Committee for Public Education* v. *Nyquist*, 413 U. S. 756 (1973).

MR. JUSTICE WHITE, concurring in the judgment.

As I read the majority opinion, the Court understands well enough that Title I funds are being used in Missouri

to pay the salaries of teachers giving special instruction on public school premises, that the State is obligated to furnish comparable services to private schools, and that the State has not satisfied the comparability requirement. It must do so if it is to continue to use Title I funds in the manner they are now being used.

The Court intimates no opinion as to whether using federal funds to pay teachers giving special instruction on private school premises would be constitutional. It suggests, however, that there may be other ways of satisfying the comparability requirement that the State should consider; and unless the State is being asked to chase rainbows, it is implied that there are programs and services comparable to on-the-premises instruction that the State could furnish private schools without violating the First Amendment. I would have thought that any such arrangement would be impermissible under the Court's recent cases construing the Establishment Clause. Not having joined those opinions, I am pleasantly surprised by what appears to be a suggestion that federal funds may in some respects be used to finance nonsectarian instruction of students in private elementary and secondary schools. If this is the case, I suggest that the Court should say so expressly. Failing that, however, I concur in the judgment.

MR. JUSTICE DOUGLAS, dissenting.

The case comes to us in an attractive posture, as the Act of Congress is in terms aimed to help "educationally deprived" children, whether they are in public or parochial schools, and I fear the judiciary has been seduced. But we must remember that "the propriety of a legislature's purposes may not immunize from further scrutiny a law which either has a primary effect that advances religion, or which fosters excessive entangle-

ments between Church and State." *Committee for Public Education* v. *Nyquist*, 413 U. S. 756, 774.

All education in essence is aimed to help children, whether bright or retarded. Schools do not exist—whether public or parochial—to keep teachers employed. Education is a skein with many threads—from classical Greek to Latin, to grammar, to philosophy, to science, to athletics, to religion. There might well be political motivation to use federal funds to make up deficits in any part of a school's budget or to strengthen it by financing all or a part of any sector of educational activity.

There are some who think it constitutionally wise to do so; and others who think it is constitutionally permissible. But the First Amendment says: "Congress shall make no law respecting an establishment of religion." In common understanding there is no surer way of "establishing" an institution than by financing it. That was true at the time of the adoption of the First Amendment. Madison, one of its foremost authors, fought the battle in Virginia where the *per capita* minimal levy on each person was no more than three pence. Yet if the State could finance a church at three pence *per capita*, the principle of "establishment" would be approved and there would be no limit to the amount of money the Government could add to church coffers. That was the teaching of his Remonstrance.[1] As Mr. Justice Black stated it, "[n]o tax in any amount, large or small, can be levied to support any religious activities or institutions, whatever they may be called, or whatever form they may adopt to teach or practice

[1] Madison's Remonstrance is reprinted in the appendices to *Everson* v. *Board of Education*, 330 U. S. 1, 63 (Rutledge, J., dissenting), and *Walz* v. *Tax Comm'n*, 397 U. S. 664, 719 (DOUGLAS, J., dissenting).

religion." *Everson* v. *Board of Education*, 330 U. S. 1, 16.[2]

Parochial schools are adjuncts of the church established at a time when state governments were highly discriminatory against some sects by introducing religious training in the public schools. The tale has been told often;[3] and there is no need to repeat it here. Parochial schools are tied to the proclamation and inculcation of a particular religious faith—sometimes Catholic, sometimes Presbyterian, sometimes Anglican, sometimes Lutheran, and so on.

The emanations from the Court's opinion are, as suggested by MR. JUSTICE WHITE, at war with our prior decisions. Federal financing of an apparently nonsectarian aspect of parochial school activities, if allowed, is not even a subtle evasion of First Amendment prohibitions. The parochial school is a unit; its budget is a unit; pouring in federal funds for what seems to be a nonsectarian phase of parochial school activities "establishes" the school so that in effect, if not in purpose, it becomes stronger financially and better able to proselytize its particular faith by having more funds left over for that objective. Allowing the State to finance the secular part of a sectarian school's program "makes a grave constitutional decision turn merely on cost accounting and

[2] *Everson* was a 5–4 decision sustaining a state law which provided reimbursement to parents of children in sectarian schools for the cost of public bus transportation used by the students in traveling to school, but even the majority recognized that the law went to the "verge" of forbidden territory under the Religion Clauses of the First Amendment. 330 U. S., at 16. Although I was with the majority in that case, I have since expressed my doubts about the correctness of that decision, *e. g.*, *Engel* v. *Vitale*, 370 U. S. 421, 443; *Walz* v. *Tax Comm'n*, *supra*, at 703.

[3] See *Lemon* v. *Kurtzman*, 403 U. S. 602, 628–629 (DOUGLAS, J., concurring).

bookkeeping entries." *Lemon* v. *Kurtzman*, 403 U. S. 602, 641 (DOUGLAS, J., concurring).

Nor could the program here be immunized from scrutiny under the Establishment Clause by portraying this aid as going to the children rather than to the sectarian schools. See *Committee for Public Education* v. *Nyquist*, *supra*, at 781 *et seq.* That argument deserves no more weight in the Establishment Clause context than it received under the Equal Protection Clause of the Fourteenth Amendment, with respect to which we summarily affirmed decisions striking down state schemes to circumvent the constitutional requirement of racial integration in public schools granting tuition aid to parents who sent their children to segregated private schools. *Poindexter* v. *Louisiana Financial Assistance Comm'n*, 275 F. Supp. 833, aff'd, 389 U. S. 571, and 296 F. Supp. 686, aff'd, 393 U. S. 17. And see *Griffin* v. *County School Board*, 377 U. S. 218.

The present case is plainly not moot; a case or controversy exists; and it is clear that if the traditional First Amendment barriers are to be maintained, no program serving students in parochial schools could be designed under this Act—whether regular school hours are used, or after-school hours, or weekend hours. The plain truth is that under the First Amendment, as construed to this day, the Act is unconstitutional to the extent it supports sectarian schools, whether directly or through its students.

We should say so now, and save the endless hours and efforts which hopeful people will expend in an effort to constitutionalize what is impossible without a constitutional amendment.

MICHIGAN *v.* TUCKER

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

No. 73–482. Argued March 20, 1974—Decided June 10, 1974

Respondent, who had been arrested for rape, was questioned by police. Before the commencement of the interrogation (which antedated this Court's decision in *Miranda* v. *Arizona*, 384 U. S. 436), respondent was advised of his right to remain silent and his right to counsel (but not of his right to the appointment of counsel if he was indigent). Respondent related an alibi that he was with a friend (Henderson), at the time of the crime, but the police later elicited from Henderson information tending to incriminate respondent. Before trial, respondent made a motion to exclude Henderson's expected testimony because respondent had revealed Henderson's identity without having received the full warnings mandated by the intervening *Miranda* decision. The motion was denied, Henderson testified, and respondent was convicted. Following affirmance on appeal, respondent sought habeas corpus relief, which the District Court granted, finding that Henderson's testimony was inadmissible because of the *Miranda* violation. The Court of Appeals affirmed. *Held:*

1. The police conduct in this case, though failing to afford respondent the full measure of procedural safeguards later set forth in *Miranda*, did not deprive respondent of his privilege against self-incrimination since the record clearly shows that respondent's statements during the police interrogation were not involuntary or the result of potential legal sanctions. Pp. 439–446.

2. The evidence derived from the police interrogation was admissible. Pp. 446–452.

(a) The police's pre-*Miranda* failure to advise respondent of his right to appointed counsel under all the circumstances of this case involved no bad faith and would not justify recourse to the exclusionary rule which is aimed at deterring willful or negligent deprivation of the accused's rights. Pp. 446–448.

(b) The failure to advise respondent of his right to appointed counsel had no bearing upon the reliability of Henderson's testimony, which was subjected to the normal testing process of an adversary trial. Pp. 448–449.

(c) The use of the testimony of a witness discovered by the police as a result of the accused's statements under these circumstances does not violate any requirements under the Fifth, Sixth, and Fourteenth Amendments relating to the adversary system. Pp. 449–450.

480 F. 2d 927, reversed.

REHNQUIST, J., delivered the opinion of the Court, in which BURGER, C. J., and STEWART, BLACKMUN, and POWELL, JJ., joined. STEWART, J., filed a concurring opinion, *post*, p. 453. BRENNAN, J., filed an opinion concurring in the judgment, in which MARSHALL, J., joined, *post*, p. 453. WHITE, J., filed an opinion concurring in the judgment, *post*, p. 460. DOUGLAS, J., filed a dissenting opinion, *post*, p. 461.

L. Brooks Patterson argued the cause for petitioner. With him on the brief was *Robert C. Williams.*

Kenneth M. Mogill, by appointment of the Court, 415 U. S. 909, argued the cause *pro hac vice* and filed a brief for respondent.

Edward R. Korman argued the cause for the United States as *amicus curiae* urging reversal. With him on the brief were *Solicitor General Bork, Assistant Attorney General Petersen, Deputy Solicitor General Frey,* and *Jerome M. Feit.*

Roman S. Gribbs argued the cause and filed a brief for the Detroit Bar Assn. as *amicus curiae* urging affirmance.*

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*Briefs of *amici curiae* urging reversal were filed by *Evelle J. Younger,* Attorney General, *Jack R. Winkler,* Chief Assistant Attorney General, and *Doris H. Maier,* Assistant Attorney General, for the State of California, and by *Frank G. Carrington, Jr., Fred E. Inbau, William K. Lambie, Wayne W. Schmidt, Glen Murphy, Paul Keller,* and *James B. Zagel* for Americans for Effective Law Enforcement et al.

The Civil Liberties Committee, State Bar of Michigan, filed a brief as *amicus curiae* urging affirmance.

MR. JUSTICE REHNQUIST delivered the opinion of the Court.

This case presents the question whether the testimony of a witness in respondent's state court trial for rape must be excluded simply because police had learned the identity of the witness by questioning respondent at a time when he was in custody as a suspect, but had not been advised that counsel would be appointed for him if he was indigent. The questioning took place before this Court's decision in *Miranda* v. *Arizona*, 384 U. S. 436 (1966), but respondent's trial, at which he was convicted, took place afterwards. Under the holding of *Johnson* v. *New Jersey*, 384 U. S. 719 (1966), therefore, *Miranda* is applicable to this case. The United States District Court for the Eastern District of Michigan reviewed respondent's claim on a petition for habeas corpus and held that the testimony must be excluded.[1] The Court of Appeals affirmed.[2]

I

On the morning of April 19, 1966, a 43-year-old woman in Pontiac, Michigan, was found in her home by a friend and coworker, Luther White, in serious condition. At the time she was found the woman was tied, gagged, and partially disrobed, and had been both raped and severely beaten. She was unable to tell White anything about her assault at that time and still remains unable to recollect what happened.

While White was attempting to get medical help for the victim and to call for the police, he observed a dog inside the house. This apparently attracted White's attention for he knew that the woman did not own a dog

[1] 352 F. Supp. 266 (1972).

[2] 480 F. 2d 927 (1973).

herself. Later, when talking with police officers, White observed the dog a second time, and police followed the dog to respondent's house. Neighbors further connected the dog with respondent.

The police then arrested respondent and brought him to the police station for questioning. Prior to the actual interrogation the police asked respondent whether he knew for what crime he had been arrested, whether he wanted an attorney, and whether he understood his constitutional rights.[3] Respondent replied that he did understand the crime for which he was arrested, that he did not want an attorney, and that he understood his rights.[4] The police further advised him that any statements he might make could be used against him at a later date in court.[5] The police, however, did not advise respondent that he would be furnished counsel free of charge if he could not pay for such services himself.

The police then questioned respondent about his activities on the night of the rape and assault. Respondent replied that during the general time period at issue he had first been with one Robert Henderson and then later at home, alone, asleep. The police sought to confirm this story by contacting Henderson, but Henderson's story served to discredit rather than to bolster respondent's account. Henderson acknowledged that respondent had been with him on the night of the crime but said that he had left at a relatively early time. Furthermore, Henderson told police that he saw respondent the following day and asked him at that time about scratches on his face—"asked him if he got hold of a wild one or something."[6] Respondent answered: "[S]omething like

[3] Tr. of Prelim. Hearing 99.

[4] *Ibid.*

[5] *Id.*, at 99–100.

[6] Tr. of Trial 223.

that." [7] Then, Henderson said, he asked respondent "who it was," [8] and respondent said: "[S]ome woman lived the next block over," [9] adding: "She is a widow woman" or words to that effect.[10]

These events all occurred prior to the date on which this Court handed down its decision in *Miranda* v. *Arizona, supra,* but respondent's trial occurred afterwards. Prior to trial respondent's appointed counsel made a motion to exclude Henderson's expected testimony because respondent had revealed Henderson's identity without having received full *Miranda* warnings. Although respondent's own statements taken during interrogation were excluded, the trial judge denied the motion to exclude Henderson's testimony. Henderson therefore testified at trial, and respondent was convicted of rape and sentenced to 20 to 40 years' imprisonment. His conviction was affirmed by both the Michigan Court of Appeals [11] and the Michigan Supreme Court.[12]

Respondent then sought habeas corpus relief in Federal District Court. That court, noting that respondent had not received the full *Miranda* warnings and that the police had stipulated Henderson's identity was learned only through respondent's answers, "reluctantly" concluded that Henderson's testimony could not be admitted.[13] Application of such an exclusionary rule was necessary, the court reasoned, to protect respondent's Fifth Amendment right against compulsory self-incrimination. The court therefore granted respondent's petition for a writ of habeas corpus unless petitioner

[7] *Ibid.*
[8] *Id.*, at 224.
[9] *Ibid.*
[10] *Ibid.*
[11] 19 Mich. App. 320, 172 N. W. 2d 712 (1969).
[12] 385 Mich. 594, 189 N. W. 2d 290 (1971).
[13] 352 F. Supp., at 268.

retried respondent within 90 days. The Court of Appeals for the Sixth Circuit affirmed. We granted certiorari, 414 U. S. 1062 (1973), and now reverse.

II

Although respondent's sole complaint is that the police failed to advise him that he would be given free counsel if unable to afford counsel himself, he did not, and does not now, base his arguments for relief on a right to counsel under the Sixth and Fourteenth Amendments. Nor was the right to counsel, as such, considered to be persuasive by either federal court below. We do not have a situation such as that presented in *Escobedo* v. *Illinois*, 378 U. S. 478 (1964), where the policemen interrogating the suspect had refused his repeated requests to see his lawyer who was then present at the police station. As we have noted previously, *Escobedo* is not to be broadly extended beyond the facts of that particular case. See *Johnson* v. *New Jersey*, 384 U. S., at 733–734; *Kirby* v. *Illinois*, 406 U. S. 682, 689 (1972); *Frazier* v. *Cupp*, 394 U. S. 731, 739 (1969). This case also falls outside the rationale of *United States* v. *Wade*, 388 U. S. 218, 224 (1967), where the Court held that counsel was needed at a post-indictment lineup in order to protect the "right to a fair trial at which the witnesses against [the defendant] might be meaningfully cross-examined." Henderson was fully available for searching cross-examination at respondent's trial.

Respondent's argument, and the opinions of the District Court and Court of Appeals, instead rely upon the Fifth Amendment right against compulsory self-incrimination and the safeguards designed in *Miranda* to secure that right. In brief, the position urged upon this Court is that proper regard for the privilege against compulsory self-incrimination requires, with limited exceptions not

applicable here, that all evidence derived solely from statements made without full *Miranda* warnings be excluded at a subsequent criminal trial. For purposes of analysis in this case we believe that the question thus presented is best examined in two separate parts. We will therefore first consider whether the police conduct complained of directly infringed upon respondent's right against compulsory self-incrimination or whether it instead violated only the prophylactic rules developed to protect that right. We will then consider whether the evidence derived from this interrogation must be excluded.

III

The history of the Fifth Amendment right against compulsory self-incrimination, and the evils against which it was directed, have received considerable attention in the opinions of this Court. See, *e. g.*, *Kastigar* v. *United States*, 406 U. S. 441 (1972); *Miranda* v. *Arizona*, *supra*; *Murphy* v. *Waterfront Comm'n*, 378 U. S. 52 (1964); *Ullmann* v. *United States*, 350 U. S. 422, 426 (1956); *Counselman* v. *Hitchcock*, 142 U. S. 547 (1892). At this point in our history virtually every schoolboy is familiar with the concept, if not the language, of the provision that reads: "No person . . . shall be compelled in any criminal case to be a witness against himself . . . ." This Court's decisions have referred to the right as "the mainstay of our adversary system of criminal justice," *Johnson* v. *New Jersey*, *supra*, at 729, and as " 'one of the great landmarks in man's struggle to make himself civilized.' " *Ullmann*, *supra*, at 426. It is not surprising that the constitution of virtually every State has a comparable provision. 8 J. Wigmore, Evidence § 2252 (McNaughton rev. 1961) (hereinafter Wigmore).

The importance of a right does not, by itself, determine its scope, and therefore we must continue to hark back

to the historical origins of the privilege, particularly the evils at which it was to strike. The privilege against compulsory self-incrimination was developed by painful opposition to a course of ecclesiastical inquisitions and Star Chamber proceedings occurring several centuries ago. See L. Levy, Origins of the Fifth Amendment (1968); Morgan, The Privilege Against Self-Incrimination, 34 Minn. L. Rev. 1 (1949); 8 Wigmore § 2250. Certainly anyone who reads accounts of those investigations, which placed a premium on compelling subjects of the investigation to admit guilt from their own lips, cannot help but be sensitive to the Framers' desire to protect citizens against such compulsion. As this Court has noted, the privilege against self-incrimination "was aimed at a . . . far-reaching evil—a recurrence of the Inquisition and the Star Chamber, even if not in their stark brutality." *Ullmann, supra,* at 428.

Where there has been genuine compulsion of testimony, the right has been given broad scope. Although the constitutional language in which the privilege is cast might be construed to apply only to situations in which the prosecution seeks to call a defendant to testify against himself at his criminal trial, its application has not been so limited. The right has been held applicable to proceedings before a grand jury, *Counselman* v. *Hitchcock, supra;* to civil proceedings, *McCarthy* v. *Arndstein,* 266 U. S. 34 (1924); to congressional investigations, *Watkins* v. *United States,* 354 U. S. 178 (1957); to juvenile proceedings, *In re Gault,* 387 U. S. 1 (1967); and to other statutory inquiries, *Malloy* v. *Hogan,* 378 U. S. 1 (1964). The privilege has also been applied against the States by virtue of the Fourteenth Amendment. *Ibid.*

The natural concern which underlies many of these decisions is that an inability to protect the right at

one stage of a proceeding may make its invocation useless at a later stage. For example, a defendant's right not to be compelled to testify against himself at his own trial might be practically nullified if the prosecution could previously have required him to give evidence against himself before a grand jury. Testimony obtained in civil suits, or before administrative or legislative committees, could also prove so incriminating that a person compelled to give such testimony might readily be convicted on the basis of those disclosures in a subsequent criminal proceeding.[14]

In more recent years this concern—that compelled disclosures might be used against a person at a later criminal trial—has been extended to cases involving police interrogation. Before *Miranda* the principal issue in these cases was not whether a defendant had waived his privilege against compulsory self-incrimination but simply whether his statement was "voluntary." In state cases the Court applied the Due Process Clause of the Fourteenth Amendment, examining the circumstances of interrogation to determine whether the processes were so unfair or unreasonable as to render a subsequent confession involuntary. See, *e. g.*, *Brown* v. *Mississippi*, 297 U. S. 278 (1936); *Chambers* v. *Florida*, 309 U. S. 227 (1940); *White* v. *Texas*, 310 U. S. 530 (1940); *Payne* v. *Arkansas*, 356 U. S. 560 (1958); *Haynes* v. *Washington*, 373 U. S. 503 (1963). See also 3 J. Wigmore, Evidence § 815 *et seq.* (Chadbourne rev. 1970). Where the State's actions offended the standards of fundamental fairness under the Due Process Clause, the State was then deprived of the right to use the resulting confessions in court.

[14] The Court has also held that comment on a defendant's silence or refusal to take the witness stand may be an impermissible penalty on exercise of the privilege. See *Griffin* v. *California*, 380 U. S. 609 (1965).

Although federal cases concerning voluntary confessions often contained references to the privilege against compulsory self-incrimination,[15] references which were strongly criticized by some commentators, see 8 Wigmore § 2266,[16] it was not until this Court's decision in *Miranda* that the privilege against compulsory self-incrimination was seen as the principal protection for a person facing police interrogation. This privilege had been made applicable to the States in *Malloy* v. *Hogan*, *supra*, and was thought to offer a more comprehensive and

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[15] For example in *Bram* v. *United States*, 168 U. S. 532, 542 (1897), the Court stated:

"In criminal trials, in the courts of the United States, wherever a question arises whether a confession is incompetent because not voluntary, the issue is controlled by that portion of the Fifth Amendment to the Constitution of the United States, commanding that no person 'shall be compelled in any criminal case to be a witness against himself.'"

As noted in the text, the privilege against compulsory self-incrimination was not held applicable against the States until *Malloy* v. *Hogan*, 378 U. S. 1 (1964).

[16] Wigmore states his objection in the following terms:

"Today in the United States confessions, and probably even lesser self-incriminating admissions, are excluded despite their trustworthiness if coerced. The policies leading to this recent extension of the confession rule are quite similar to those underlying the privilege against self-incrimination. It is thus not surprising that the privilege, with its unclear boundaries and apparently unending capacity for transmogrification and assimilation, is now sometimes invoked to effect exclusion even though the disclosure was not compelled from a person under legal compulsion. Distortion of the privilege to cover such situations is not necessary. If trustworthy confessions are to be excluded because coerced, it should be done frankly as an exception to the principle . . . that the illegality of source of evidence is immaterial. It should be done, as it usually is, on the ground that the combination of coercion and use of the evidence in the particular case violates the relevant constitutional due process clause." *Id.*, at 402. (Citations omitted.)

less subjective protection than the doctrine of previous cases. In *Miranda* the Court examined the facts of four separate cases and stated:

> "In these cases, we might not find the defendants' statements to have been involuntary in traditional terms. Our concern for adequate safeguards to protect precious Fifth Amendment rights is, of course, not lessened in the slightest. . . . To be sure, the records do not evince overt physical coercion or patent psychological ploys. The fact remains that in none of these cases did the officers undertake to afford appropriate safeguards at the outset of the interrogation to insure that the statements were truly the product of free choice." 384 U. S., at 457.

Thus the Court in *Miranda*, for the first time, expressly declared that the Self-Incrimination Clause was applicable to state interrogations at a police station, and that a defendant's statements might be excluded at trial despite their voluntary character under traditional principles.

To supplement this new doctrine, and to help police officers conduct interrogations without facing a continued risk that valuable evidence would be lost, the Court in *Miranda* established a set of specific protective guidelines, now commonly known as the *Miranda* rules. The Court declared that "the prosecution may not use statements, whether exculpatory or inculpatory, stemming from custodial interrogation of the defendant unless it demonstrates the use of procedural safeguards effective to secure the privilege against self-incrimination." *Id.*, at 444. A series of recommended "procedural safeguards" then followed. The Court in particular stated:

> "Prior to any questioning, the person must be warned that he has a right to remain silent, that any statement he does make may be used as evidence

> against him, and that he has a right to the presence of an attorney, either retained or appointed." *Ibid.*

The Court said that the defendant, of course, could waive these rights, but that any waiver must have been made "voluntarily, knowingly and intelligently." *Ibid.*

The Court recognized that these procedural safeguards were not themselves rights protected by the Constitution but were instead measures to insure that the right against compulsory self-incrimination was protected. As the Court remarked:

> "[W]e cannot say that the Constitution necessarily requires adherence to any particular solution for the inherent compulsions of the interrogation process as it is presently conducted." *Id.*, at 467.

The suggested safeguards were not intended to "create a constitutional straitjacket," *ibid.*, but rather to provide practical reinforcement for the right against compulsory self-incrimination.

A comparison of the facts in this case with the historical circumstances underlying the privilege against compulsory self-incrimination strongly indicates that the police conduct here did not deprive respondent of his privilege against compulsory self-incrimination as such, but rather failed to make available to him the full measure of procedural safeguards associated with that right since *Miranda*. Certainly no one could contend that the interrogation faced by respondent bore any resemblance to the historical practices at which the right against compulsory self-incrimination was aimed. The District Court in this case noted that the police had "warned [respondent] that he had the right to remain silent," 352 F. Supp. 266, 267 (1972), and the record in this case clearly shows that respondent was informed that any evidence taken could be used against him.[17] The record is also clear that

[17] See n. 5, *supra*.

respondent was asked whether he wanted an attorney and that he replied that he did not.[18] Thus, his statements could hardly be termed involuntary as that term has been defined in the decisions of this Court. Additionally, there were no legal sanctions, such as the threat of contempt, which could have been applied to respondent had he chosen to remain silent. He was simply not exposed to "the cruel trilemma of self-accusation, perjury or contempt." *Murphy* v. *Waterfront Comm'n,* 378 U. S., at 55.

Our determination that the interrogation in this case involved no compulsion sufficient to breach the right against compulsory self-incrimination does not mean there was not a disregard, albeit an inadvertent disregard, of the procedural rules later established in *Miranda.* The question for decision is how sweeping the judicially imposed consequences of this disregard shall be. This Court said in *Miranda* that statements taken in violation of the *Miranda* principles must not be used to prove the prosecution's case at trial. That requirement was fully complied with by the state court here: respondent's statements, claiming that he was with Henderson and then asleep during the time period of the crime were not admitted against him at trial. This Court has also said, in *Wong Sun* v. *United States,* 371 U. S. 471 (1963), that the "fruits" of police conduct which actually infringed a defendant's Fourth Amendment rights must be suppressed.[19] But we have already concluded that the

[18] See nn. 3 and 4, *supra.*

[19] In *Wong Sun* the police discovered evidence through statements made by the accused after he had been placed under arrest. This Court, finding that the arrest had occurred without probable cause, held that the derivative evidence could not be introduced against the accused at trial. For the reasons stated in the text we do not believe that *Wong Sun* controls the case before us.

police conduct at issue here did not abridge respondent's constitutional privilege against compulsory self-incrimination, but departed only from the prophylactic standards later laid down by this Court in *Miranda* to safeguard that privilege. Thus, in deciding whether Henderson's testimony must be excluded, there is no controlling precedent of this Court to guide us. We must therefore examine the matter as a question of principle.

IV

Just as the law does not require that a defendant receive a perfect trial, only a fair one, it cannot realistically require that policemen investigating serious crimes make no errors whatsoever. The pressures of law enforcement and the vagaries of human nature would make such an expectation unrealistic. Before we penalize police error, therefore, we must consider whether the sanction serves a valid and useful purpose.

We have recently said, in a search-and-seizure context, that the exclusionary rule's "prime purpose is to deter future unlawful police conduct and thereby effectuate the guarantee of the Fourth Amendment against unreasonable searches and seizures." *United States* v. *Calandra*, 414 U. S. 338, 347 (1974). We then continued:

> " 'The rule is calculated to prevent, not to repair. Its purpose is to deter—to compel respect for the constitutional guaranty in the only effectively available way—by removing the incentive to disregard it.' *Elkins* v. *United States*, 364 U. S. 206, 217 (1960)." [20] *Ibid.*

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[20] The opinion also relied upon *Mapp* v. *Ohio*, 367 U. S. 643, 656 (1961); *Tehan* v. *United States ex rel. Shott*, 382 U. S. 406, 416 (1966); and *Terry* v. *Ohio*, 392 U. S. 1, 29 (1968). See 414 U. S., at 348.

In a proper case this rationale would seem applicable to the Fifth Amendment context as well.

The deterrent purpose of the exclusionary rule necessarily assumes that the police have engaged in willful, or at the very least negligent, conduct which has deprived the defendant of some right. By refusing to admit evidence gained as a result of such conduct, the courts hope to instill in those particular investigating officers, or in their future counterparts, a greater degree of care toward the rights of an accused. Where the official action was pursued in complete good faith, however, the deterrence rationale loses much of its force.

We consider it significant to our decision in this case that the officers' failure to advise respondent of his right to appointed counsel occurred prior to the decision in *Miranda*. Although we have been urged to resolve the broad question of whether evidence derived from statements taken in violation of the *Miranda* rules must be excluded regardless of when the interrogation took place,[21] we instead place our holding on a narrower ground. For at the time respondent was questioned these police officers were guided, quite rightly, by the principles established in *Escobedo* v. *Illinois*, 378 U. S. 478 (1964), particularly focusing on the suspect's opportunity to have retained counsel with him during the interrogation if he chose to do so.[22] Thus, the police asked respondent if he wanted counsel, and he answered that he did not. The

[21] Brief for United States as *Amicus Curiae* 31 *et seq.*; Brief for Respondent 9 *et seq.*

[22] As previously noted, the defendant in *Escobedo* had repeatedly asked to see his lawyer who was available at the police station. Those requests were denied, and the defendant ultimately confessed. Thus, in direct contrast to the situation here, the defendant in *Escobedo* was told he did *not* have a right to see his lawyer, although he had expressly stated his desire to do so.

statements actually made by respondent to the police, as we have observed, were excluded at trial in accordance with *Johnson* v. *New Jersey*, 384 U. S. 719 (1966). Whatever deterrent effect on future police conduct the exclusion of those statements may have had, we do not believe it would be significantly augmented by excluding the testimony of the witness Henderson as well.

When involuntary statements or the right against compulsory self-incrimination are involved, a second justification for the exclusionary rule also has been asserted: protection of the courts from reliance on untrustworthy evidence.[23] Cases which involve the Self-Incrimination Clause must, by definition, involve an element of coercion, since the Clause provides only that a person shall not be *compelled* to give evidence against himself. And cases involving statements often depict severe pressures which may override a particular suspect's insistence on innocence. Fact situations ranging from classical third-degree torture, *Brown* v. *Mississippi*, 297 U. S. 278 (1936), to prolonged isolation from family or friends in a hostile setting, *Gallegos* v. *Colorado*, 370 U. S. 49 (1962), or to a simple desire on the part of a physically or mentally ex-

[23] The Court has made clear that the truth or falsity of a statement is not the determining factor in the decision whether or not to exclude it. *Jackson* v. *Denno*, 378 U. S. 368 (1964). Thus a State which has obtained a coerced or involuntary statement cannot argue for its admissibility on the ground that other evidence demonstrates its truthfulness. *Ibid.* But it also seems clear that coerced statements have been regarded with some mistrust. The Court in *Escobedo*, for example, stated that "a system of criminal law enforcement which comes to depend on the 'confession' will, in the long run, be less reliable and more subject to abuses" than a system relying on independent investigation, 378 U. S., at 488–489. The Court then cited several authorities concerned with false confessions. *Id.*, at 489 n. 11. Although completely voluntary confessions may, in many cases, advance the cause of justice and rehabilitation, coerced confessions, by their nature, cannot serve the same ends.

hausted suspect to have a seemingly endless interrogation end, *Watts* v. *Indiana*, 338 U. S. 49 (1949), all might be sufficient to cause a defendant to accuse himself falsely.

But those situations are a far cry from that presented here. The pressures on respondent to accuse himself were hardly comparable even with the least prejudicial of those pressures which have been dealt with in our cases. More important, the respondent did *not* accuse himself. The evidence which the prosecution successfully sought to introduce was not a confession of guilt by respondent, or indeed even an exculpatory statement by respondent, but rather the testimony of a third party who was subjected to no custodial pressures. There is plainly no reason to believe that Henderson's testimony is untrustworthy simply because *respondent* was not advised of *his* right to appointed counsel. Henderson was both available at trial and subject to cross-examination by respondent's counsel, and counsel fully used this opportunity, suggesting in the course of his cross-examination that Henderson's character was less than exemplary and that he had been offered incentives by the police to testify against respondent.[24] Thus the reliability of his testimony was subject to the normal testing process of an adversary trial.

Respondent contends that an additional reason for excluding Henderson's testimony is the notion that the adversary system requires "the government in its contest with the individual to shoulder the entire load." 8 Wigmore § 2251, p. 317; *Murphy* v. *Waterfront Comm'n*, 378 U. S., at 55; *Miranda* v. *Arizona*, 384 U. S., at 460. To the extent that this suggested basis for the exclusionary rule in Fifth Amendment cases may exist independently of the deterrence and trustworthiness rationales, we think it of no avail to respondent here. Sub-

[24] Tr. of Trial 226–234.

ject to applicable constitutional limitations, the Government is not forbidden all resort to the defendant to make out its case. It may require the defendant to give physical evidence against himself, see *Schmerber* v. *California*, 384 U. S. 757 (1966); *United States* v. *Dionisio*, 410 U. S. 1 (1973), and it may use statements which are voluntarily given by the defendant after he receives full disclosure of the rights offered by *Miranda*. Here we deal, not with the offer of respondent's own statements in evidence, but only with the testimony of a witness whom the police discovered as a result of respondent's statements. This recourse to respondent's voluntary statements does no violence to such elements of the adversary system as may be embodied in the Fifth, Sixth, and Fourteenth Amendments.

In summary, we do not think that any single reason supporting exclusion of this witness' testimony, or all of them together, are very persuasive.[25] By contrast, we find the arguments in favor of admitting the testimony quite strong. For, when balancing the interests involved, we must weigh the strong interest under any system of justice of making available to the trier of fact all concededly relevant and trustworthy evidence which either party seeks to adduce. In this particular case we also "must consider society's interest in the effective prosecution of criminals in light of the protection our pre-*Miranda* standards afford criminal defendants." *Jenkins*

[25] It has been suggested that courts should exclude evidence derived from "lawless invasions of the constitutional rights of citizens," *Terry* v. *Ohio*, 392 U. S., at 13, in recognition of "the imperative of judicial integrity." *Elkins* v. *United States*, 364 U. S. 206, 222 (1960). This rationale, however, is really an assimilation of the more specific rationales discussed in the text of this opinion, and does not in their absence provide an independent basis for excluding challenged evidence.

v. *Delaware*, 395 U. S. 213, 221 (1969). These interests may be outweighed by the need to provide an effective sanction to a constitutional right, *Weeks* v. *United States*, 232 U. S. 383 (1914), but they must in any event be valued. Here respondent's own statement, which might have helped the prosecution show respondent's guilty conscience at trial, had already been excised from the prosecution's case pursuant to this Court's *Johnson* decision. To extend the excision further under the circumstances of this case and exclude relevant testimony of a third-party witness would require far more persuasive arguments than those advanced by respondent.

This Court has already recognized that a failure to give interrogated suspects full *Miranda* warnings does not entitle the suspect to insist that statements made by him be excluded in every conceivable context. In *Harris* v. *New York*, 401 U. S. 222 (1971), the Court was faced with the question of whether the statements of the defendant himself, taken without informing him of his right of access to appointed counsel, could be used to impeach defendant's direct testimony at trial. The Court concluded that they could, saying:

> "Some comments in the *Miranda* opinion can indeed be read as indicating a bar to use of an uncounseled statement for any purpose, but discussion of that issue was not at all necessary to the Court's holding and cannot be regarded as controlling. *Miranda* barred the prosecution from making its case with statements of an accused made while in custody prior to having or effectively waiving counsel. It does not follow from *Miranda* that evidence inadmissible against an accused in the prosecution's case in chief is barred for all purposes, provided of course that the trustworthiness of the evidence satisfies legal standards." *Id.*, at 224.

We believe that this reasoning is equally applicable here. Although *Johnson* enabled respondent to block admission of his own statements, we do not believe that it requires the prosecution to refrain from all use of those statements, and we disagree with the courts below that Henderson's testimony should have been excluded in this case.[26]

Reversed.

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[26] Our Brother BRENNAN in his opinion concurring in the judgment treats the principal question here simply as a lineal descendant of the one decided in *Linkletter* v. *Walker*, 381 U. S. 618 (1965), to be analyzed only in terms of the retroactivity framework established in that and subsequent decisions. While his approach has a beguiling simplicity, we believe it marks a significant and unsettling departure from the past practice of the Court in this area. Our retroactivity cases, from *Linkletter* v. *Walker*, *supra*, to *Gosa* v. *Mayden*, 413 U. S. 665 (1973), all have in common a particular factual predicate: a previous constitutional decision of this Court governs the facts of an earlier decided case unless the constitutional decision is not to have retroactive effect. The doctrine of retroactivity does not modify the substantive scope of the constitutional decision but rather determines the point in time when it is held to apply.

That common factual predicate is absent here. No defendant in *Miranda* sought to block evidence of the type challenged in this case, and the holding of *Miranda*, even if made fully retroactive, would not therefore resolve the question of whether Henderson's testimony must also be excluded at trial. Contrary, therefore, to the suggestion in our Brother's opinion that the question here is whether to "limit the effect of *Johnson* v. *New Jersey*," *post*, at 454 n. 1, *Johnson* has never been thought controlling on the question of fruits, for the simple reason that the parent *Miranda* case did not reach that issue.

Our Brother BRENNAN'S method of disposition is to determine in the present case the retroactivity of a holding which the Court has yet to make. He would say, in effect, that if the Court should later determine that *Miranda* requires exclusion of fruits such as the testimony of Henderson, nonetheless that determination shall not be applied retroactively. But this approach wholly subverts the heretofore established relationship between the parent case and the subsidiary case determining whether or not to apply the parent case

MR. JUSTICE STEWART, concurring.

In joining the opinion of the Court, I add only that I could also join MR. JUSTICE BRENNAN'S concurrence. For it seems to me that despite differences in phraseology, and despite the disclaimers of their respective authors, the Court opinion and that of MR. JUSTICE BRENNAN proceed along virtually parallel lines, give or take a couple of argumentative footnotes.

MR. JUSTICE BRENNAN, with whom MR. JUSTICE MARSHALL joins, concurring in the judgment.

The Court finds it unnecessary to decide "the broad question" of whether the fruits of "statements taken in violation of the *Miranda* rules must be excluded regardless of when the interrogation took place," *ante*, at 447, since respondent's interrogation occurred prior to our decision in *Miranda* v. *Arizona*, 384 U. S. 436 (1966). In my view, however, it is unnecessary, too, for the Court to address the narrower question of whether the principles of *Miranda* require that fruits be excluded when obtained as a result of a pre-*Miranda* interrogation without the requisite prior warnings. The Court, in answering this question, proceeds from the premise that *Johnson* v. *New Jersey*, 384 U. S. 719 (1966), makes *Miranda* applicable to all cases in which a criminal trial was commenced after the date of our decision in *Miranda*,

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retroactively. Under the framework of the analysis established in *Linkletter*, *supra*, and in subsequent cases, it would seem indispensable to understand the basis for a constitutional holding of the Court in order to later determine whether that holding should be retroactive. Yet *ex hypothesi* our Brother has no such analysis available, since the case has yet to be decided. Cases which *subsequently* determine the retroactivity of a constitutional holding have given the Court enough occasion for concern without substantially increasing the difficulty of that type of decision by making it before, rather than after, the constitutional holding.

and that, since respondent's trial was post-*Miranda*, the effect of *Miranda* on this case must be resolved. I would not read *Johnson* as making *Miranda* applicable to this case.[1]

Frank acknowledgment that retroactive application of newly announced constitutional rules of criminal procedure may have a serious impact on the administration of criminal justice has led us, since *Linkletter* v. *Walker*, 381 U. S. 618 (1965), to determine retroactivity in terms of three criteria: (1) the purpose served by the new rules; (2) the extent of law enforcement officials' justifiable reliance on prior standards; and (3) the effect on the administration of justice of a retroactive application of the new rules. See, *e. g.*, *Michigan* v. *Payne*, 412 U. S. 47, 51 (1973); *Stovall* v. *Denno*, 388 U. S. 293, 297 (1967); *Tehan* v. *United States ex rel. Shott*, 382 U. S. 406, 410–418 (1966). We have as a general matter limited our discussion of the relevant "purpose" of new rules to their functional value in enhancing the reliability of the factfinding process. See, *e. g.*, *Williams* v. *United States*, 401 U. S. 646, 653 (1971); *id.*, at 663 (concurring opinion); *Desist* v. *United States*, 394 U. S. 244, 249–250 (1969); *Roberts* v. *Russell*, 392 U. S. 293, 294 (1968); *Tehan* v. *United States ex rel. Shott*, *supra*; *Linkletter* v. *Walker*, *supra*, at 638–639. This limiting approach has been taken in recognition that "[t]he basic purpose of a trial is the determination of truth," *Tehan* v. *United States ex rel. Shott*, *supra*, at 416; see *Stovall* v. *Denno*, *supra*, at 297–298, and that the principal legitimate interest of a convicted defendant is therefore assur-

[1] Although the petition for certiorari did not urge us to limit the effect of *Johnson* v. *New Jersey*, this issue was raised in petitioner's brief as well as in the *amicus curiae* brief of the State of California, filed in support of petitioner. See *Mapp* v. *Ohio*, 367 U. S. 643, 646 n. 3 (1961); *Stovall* v. *Denno*, 388 U. S. 293, 294 n. 1 (1967).

ance that the factfinding process at his trial was not unduly impaired by adherence to the old standards.

In *Johnson* v. *New Jersey, supra,* the Court was called upon to determine whether the newly announced procedures in *Miranda* v. *Arizona* should be retroactively applied to upset final convictions based in part upon confessions obtained without the prior warnings required by *Miranda.* Aware that *Miranda* provided new safeguards against the possible use at trial of unreliable statements of the accused, we nonetheless concluded that the decision should not be retroactively applied.[2] The prob-

[2] In *Johnson* we commented—as we have on a number of occasions in deciding to apply new constitutional rules of criminal procedure retroactively—that "we do not disparage a constitutional guarantee in any manner by declining to apply it retroactively." 384 U. S., at 728; *Michigan* v. *Payne,* 412 U. S. 47, 55 n. 10 (1973). This is so, because a prospective application of new rules will often serve important purposes other than the correction of serious flaws in the truth-determining process.

The Fifth Amendment privilege against compulsory self-incrimination—guaranteed full effectuation by the *Miranda* rules—serves a variety of significant purposes not relevant to the truth-determining process. See *Tehan* v. *United States ex rel. Shott,* 382 U. S. 406, 415–416 (1966). A number of these purposes were catalogued in *Murphy* v. *Waterfront Comm'n,* 378 U. S. 52, 55 (1964):

"The privilege against self-incrimination 'registers an important advance in the development of our liberty—"one of the great landmarks in man's struggle to make himself civilized."' *Ullmann* v. *United States,* 350 U. S. 422, 426. It reflects many of our fundamental values and most noble aspirations: our unwillingness to subject those suspected of crime to the cruel trilemma of self-accusation, perjury or contempt; our preference for an accusatorial rather than an inquisitorial system of criminal justice; our fear that self-incriminating statements will be elicited by inhumane treatment and abuses; our sense of fair play which dictates 'a fair state-individual balance by requiring the government to leave the individual alone until good cause is shown for disturbing him and by requiring the government in its contest with the individual to shoulder the entire load,' 8 Wigmore, Evidence (McNaughton rev., 1961), 317; our

ability that the truth-determining process was distorted by, and individuals were convicted on the basis of, coerced confessions was minimized, we found, by the availability of strict pre-*Miranda* standards to test the voluntariness of confessions. 384 U. S., at 730. In addition, we recognized that law enforcement agencies had justifiably relied on our prior rulings and that retroactive application would necessitate the wholesale release and subsequent retrial of vast numbers of prisoners. *Id.*, at 731. Then, in statements unnecessary to our decision—since all of the convictions of the petitioners in *Johnson* had long since become final at the time of our decision in *Miranda*—we went on to say that our newly announced *Miranda* rules should be applied to trials begun after the date that decision was announced. *Id.*, at 732.

The conclusion that the *Miranda* rules should be applied to post-*Miranda* trials made good sense, where criminal defendants were seeking to exclude *direct statements* made without prior warning of their rights. Exclusion of possibly unreliable pre-*Miranda* statements made in the inherently coercive atmosphere of in-custody interrogation, see *Miranda* v. *Arizona*, 384 U. S., at 457–458, 467, 470, could be obtained at a relatively low cost. For, although the police might have relied in good faith on our prior rulings in interrogating defendants without first advising them of their rights, *Miranda* put the police on notice that pre-*Miranda* confessions obtained without prior warnings would be inadmissible at defendants' trials.

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respect for the inviolability of the human personality and of the right of each individual 'to a private enclave where he may lead a private life,' *United States* v. *Grunewald*, 233 F. 2d 556, 581–582 (Frank, J., dissenting), rev'd 353 U. S. 391; our distrust of self-deprecatory statements; and our realization that the privilege, while sometimes 'a shelter to the guilty,' is often 'a protection to the innocent.' *Quinn* v. *United States*, 349 U. S. 155, 162." (Footnotes omitted.)

Since defendants who had made pre-*Miranda* confessions had not yet gone to trial, and the police investigations into those cases were still fresh, *Johnson* envisioned "no undue burden [being] imposed upon prosecuting authorities by requiring them to find evidentiary substitutes for statements obtained in violation of the constitutional protections afforded by *Miranda*." *Jenkins* v. *Delaware*, 395 U. S. 213, 219–220 (1969); see *Johnson* v. *New Jersey*, 384 U. S., at 732.

Application of the *Miranda* standards to the present case, however, presents entirely different problems. Unlike the situation contemplated in *Johnson*, the burden imposed upon law enforcement officials to obtain evidentiary substitutes for inadmissible "fruits" will likely be substantial. The lower courts, confronted with the question of the application of *Miranda* to fruits, have provided differing answers on the admissibility issue.[3] The police, therefore, could not reasonably have been expected to know that substitute evidence would be necessary. As a result, in a case such as the present one, in which law enforcement officials have relied on trial and appellate court determinations that fruits are admissible, a contrary ruling by this Court, coming years after the commission of the crime, would severely handicap any attempt to retry the defendant. The burden on law enforcement officers, in that circumstance, would be comparable to that in *Jenkins* v. *Delaware*, *supra*, where we declined to apply the *Miranda* rules to post-*Miranda* retrials of persons whose original trials were commenced prior to *Miranda*. There, we said:

"[C]oncern for the justifiable reliance of law enforce-

[3] Compare the decisions of the Michigan courts in the instant case, 19 Mich. App. 320, 172 N. W. 2d 712 (1969), and 385 Mich. 594, 189 N. W. 2d 290 (1971), with *United States* v. *Cassell*, 452 F. 2d 533 (CA7 1971), and *People* v. *Peacock*, 29 App. Div. 2d 762, 287 N. Y. S. 2d 166 (1968).

> ment officials upon pre-*Miranda* standards militates against applying *Miranda* to retrials . . . . As we stated in *Stovall* [v. *Denno, supra*], '[I]nquiry would be handicapped by the unavailability of witnesses and dim memories.' 388 U. S., at 300. The burden would be particularly onerous where an investigation was closed years prior to a retrial because law enforcement officials relied in good faith upon a strongly incriminating statement, admissible at the first trial, to provide the cornerstone of the prosecution's case." 395 U. S., at 220 (footnote omitted).

Moreover, the element of unreliability—a legitimate concern in *Johnson* because of the inherently coercive nature of in-custody interrogation—is of less importance when the admissibility of "fruits" is at issue. There is no reason to believe that the coercive atmosphere of the station house will have any effect whatsoever on the trustworthiness of "fruits."

Since excluding the fruits of respondent's statements would not further the integrity of the factfinding process and would severely handicap law enforcement officials in obtaining evidentiary substitutes, I would confine the reach of *Johnson* v. *New Jersey* to those cases in which the *direct statements* of an accused made during a pre-*Miranda* interrogation were introduced at his post-*Miranda* trial. If *Miranda* is applicable at all to the fruits of statements made without proper warnings, I would limit its effect to those cases in which the fruits were obtained as a result of post-*Miranda* interrogations. Cf. *Stovall* v. *Denno*, 388 U. S. 293 (1967); *Desist* v. *United States*, 394 U. S. 244 (1969).[4]

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[4] Three approaches have been taken in deciding what cases should be affected by prospective application of new constitutional rules of criminal procedure. In *Linkletter* v. *Walker*, 381 U. S. 618 (1965), the Court held the exclusionary rule of *Mapp* v. *Ohio*, 367 U. S. 643

Since I agree that the judgment of the Court of Appeals must be reversed, I concur in the judgment of the Court.[5]

(1961), applicable to all cases in which direct review had not come to an end at the time *Mapp* was announced. See also *Tehan* v. *United States ex rel. Shott*, 382 U. S. 406 (1966). That approach, as we have observed, was abandoned in *Johnson* v. *New Jersey*, where we stated that the *Miranda* rules were applicable to all trials commenced after the date of that decision. In more recent decisions, we have regarded the cutoff point as that at which law enforcement officials could first begin to guide their conduct in accordance with our new rules. Thus, in *Stovall* v. *Denno*, 388 U. S. 293 (1967), the confrontation rulings of *United States* v. *Wade*, 388 U. S. 218 (1967), and *Gilbert* v. *California*, 388 U. S. 263 (1967), were made applicable to cases in which the confrontations took place after the date of those decisions, and in *Desist* v. *United States*, 394 U. S. 244 (1969), the exclusionary ruling of *Katz* v. *United States*, 389 U. S. 347 (1967), was made applicable only to cases in which the search and seizure took place after the announcement of *Katz*. See also *Michigan* v. *Payne*, 412 U. S. 47, 57 n. 15 (1973); *Williams* v. *United States*, 401 U. S. 646, 656–657 (1971). But cf. *Fuller* v. *Alaska*, 393 U. S. 80, 81 (1968) (holding that *Lee* v. *Florida*, 392 U. S. 378 (1968), which ruled evidence seized in violation of § 605 of the Federal Communications Act, 47 U. S. C. § 605, inadmissible in state trials, applicable to all cases in which the evidence was introduced after the date of decision in *Lee*).

The trend of our decisions since *Johnson* has thus been toward placing increased emphasis upon the point at which law enforcement personnel initially relied upon the discarded constitutional standards. See *Jenkins* v. *Delaware*, 395 U. S. 213, 218 and n. 7 (1969). As has been noted by an eminent judicial authority, such an emphasis is wholly consistent with the underlying rationale for prospective application of new rules, *i. e.*, justified reliance upon prior judicial standards. Schaefer, The Control of "Sunbursts": Techniques of Prospective Overruling, 42 N. Y. U. L. Rev. 631, 645–646 (1967).

[5] My Brother REHNQUIST argues that this concurrence "marks a significant and unsettling departure from the past practice of the Court" in respect of retroactivity. *Ante*, at 452 n. 26. He argues that *Miranda* did not decide the question of the admissibility of fruits, and therefore that there is no "parent" decision for retroactive application. But the assumption upon which the concurrence rests,

MR. JUSTICE WHITE, concurring in the judgment.

For the reasons stated in my dissent in that case, I continue to think that *Miranda* v. *Arizona*, 384 U. S. 436 (1966), was ill-conceived and without warrant in the Constitution. However that may be, the *Miranda* opinion did not deal with the admissibility of evidence derived from in-custody admissions obtained without the specified warnings, and the matter has not been settled by subsequent cases.

In *Orozco* v. *Texas*, 394 U. S. 324 (1969), it appeared that petitioner, who was convicted of murder, had been arrested and interrogated in his home without the benefit of *Miranda* warnings. Among other things, petitioner admitted having a gun and told the police where it was hidden in the house. The gun was recovered and ballistic tests, which were admitted into evidence along with various oral admissions, showed that it was the gun involved in the murder. Petitioner's conviction was affirmed, the applicability of *Miranda* being rejected by the state courts. Petitioner brought the case here, urging in his petition for certiorari, which was granted, that the ballistic evidence was a fruit of an illegal interrogation—"the direct product of interrogation" without indispensable constitutional safeguards. His brief on the merits suggested that it was error under *Miranda* to admit into evidence either his oral admissions or the evidence of ballistic tests performed on the pistol, which

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namely, that *Miranda* requires the exclusion of fruits, necessarily treats *Miranda* as a "parent" decision. For the assumption is that exclusion is necessary to give full effect to the purposes and policies underlying the *Miranda* rules and to its holding that "unless and until [the *Miranda*] warnings and waiver are demonstrated by the prosecution at trial, *no evidence* obtained as a result of interrogation can be used against [the defendant]." 384 U. S., at 479 (emphasis added). It necessarily follows that *Miranda* itself is the "parent" decision.

was referred to as "an illegally seized object." This Court reversed the conviction but after referring to the ballistic evidence, went on to hold only that the admission into evidence of Orozco's statements made without benefit of *Miranda* warnings was fatal error. Although the issue was presented, the Court did not expressly deal with the admissibility of the ballistic tests and gave no intimation that the evidence was to be excluded at the anticipated retrial.

Miranda having been applied in this Court only to the exclusion of the defendant's own statements, I would not extend its prophylactic scope to bar the testimony of third persons even though they have been identified by means of admissions that are themselves inadmissible under *Miranda*. The arguable benefits from excluding such testimony by way of possibly deterring police conduct that might compel admissions are, in my view, far outweighed by the advantages of having relevant and probative testimony, not obtained by actual coercion, available at criminal trials to aid in the pursuit of truth. The same results would not necessarily obtain with respect to the fruits of involuntary confessions. I therefore concur in the judgment.

MR. JUSTICE DOUGLAS, dissenting.

In this case the respondent, incarcerated as a result of a conviction in a state court, was granted a writ of habeas corpus by the District Court. The basis for the writ was the introduction at respondent's trial of testimony from a witness whose identity was learned solely as a result of in-custody police interrogation of the respondent preceded by warnings which were deficient under the standards enunciated in *Miranda* v. *Arizona*, 384 U. S. 436 (1966). The District Court concluded that "the introduction by the prosecution in its case in chief of testimony of a third

person which is admittedly the fruit of an illegally obtained statement by the [accused violates the accused's] Fifth Amendment rights." 352 F. Supp. 266, 268 (ED Mich. 1972). The Court of Appeals affirmed. 480 F. 2d 927 (CA6 1973).

I

Prior to interrogation, respondent was told of his right to the presence of counsel but he was not told of his right to have an attorney appointed should he be unable to afford one. Respondent is an indigent who has been represented at all times in both state and federal courts by court-appointed counsel. In *Miranda, supra,* we said:

> "The need for counsel in order to protect the privilege [against self-incrimination] exists for the indigent as well as the affluent. . . . While authorities are not required to relieve the accused of his poverty, they have the obligation not to take advantage of indigence in the administration of justice. . . .
>
> "In order to fully apprise a person interrogated of the extent of his rights under this system then, it is necessary to warn him not only that he has the right to consult with an attorney, but also that if he is indigent a lawyer will be appointed to represent him." 384 U. S., at 472–473.

I cannot agree when the Court says that the interrogation here "did not abridge respondent's constitutional privilege against compulsory self-incrimination, but departed only from the prophylactic standards later laid down by this Court in *Miranda* to safeguard that privilege." *Ante,* at 446. The Court is not free to prescribe preferred modes of interrogation absent a constitutional basis. We held the "requirement of warnings and waiver of rights [to be] fundamental with respect to the Fifth Amendment privilege," 384 U. S., at 476, and without

so holding we would have been powerless to reverse Miranda's conviction. While *Miranda* recognized that police need not mouth the precise words contained in the Court's opinion, such warnings were held necessary "unless other fully effective means are adopted to notify the person" of his rights. *Id.*, at 479. There is no contention here that other means were adopted. The respondent's statements were thus obtained "under circumstances that did not meet *constitutional* standards for protection of the privilege [against self-incrimination]." *Id.*, at 491 (emphasis added).

II

With the premise that respondent was subjected to an unconstitutional interrogation, there remains the question whether not only the testimony elicited in the interrogation but also the fruits thereof must be suppressed. Mr. Justice Holmes first articulated the "fruits" doctrine in *Silverthorne Lumber Co.* v. *United States*, 251 U. S. 385 (1920). In that case the Government had illegally seized the petitioner's corporate books and documents. The Government photographed the items before returning them and used the photographs as a basis to subpoena the petitioner to produce the originals before the grand jury. The petitioner refused to comply and was cited for contempt. In reversing, the Court noted that "[t]he essence of a provision forbidding the acquisition of evidence in a certain way is that not merely evidence so acquired shall not be used before the Court but that it shall not be used at all." *Id.*, at 392.

The principle received more recent recognition in *Wong Sun* v. *United States*, 371 U. S. 471 (1963). There one Toy had made statements to federal agents and the statements were held inadmissible against him. The statements led the agents to one Yee and at Yee's home

the agents found narcotics which were introduced at trial against Toy. In reversing Toy's conviction the Court held that the narcotics discovered at Yee's home must be excluded just as Toy's statements which led to that discovery.

The testimony of the witness in this case was no less a fruit of unconstitutional police action than the photographs in *Silverthorne* or the narcotics in *Wong Sun*. The petitioner has stipulated that the identity and the whereabouts of the witness and his connection with the case were learned about only through the unconstitutional interrogation of the respondent. His testimony must be excluded to comply with *Miranda*'s mandate that "*no* evidence obtained as a result of interrogation [not preceded by adequate warnings] can be used against" an accused. 384 U. S., at 479 (emphasis added).

III

In *Johnson* v. *New Jersey*, 384 U. S. 719 (1966), the Court held that statements obtained in violation of *Miranda* standards must be excluded from all trials occurring after the date of the *Miranda* decision. MR. JUSTICE BRENNAN suggests that *Johnson* be limited and that the fruits derived from unlawful pre-*Miranda* interrogations be admissible in trials subsequent to the *Miranda* decision. Though respondent's trial occurred subsequent to the *Miranda* decision, his interrogation preceded it. I disagree, as I disagreed in *Johnson*, that any defendant can be deprived of the full protection of the Fifth Amendment, as the Court has construed it in *Miranda*, based upon an arbitrary reference to the date of his interrogation or his trial.

In *Linkletter* v. *Walker*, 381 U. S. 618 (1965), the Court held the exclusionary rule of *Mapp* v. *Ohio*, 367 U. S. 643 (1961), inapplicable to convictions which had become "final" prior to the *Mapp* decision. As Mr.

Justice Black, joined by me, noted, the result was as follows:

> "Linkletter, convicted in the state court by use of 'unconstitutional evidence,' is today denied relief by the judgment of this Court because his conviction became 'final' before *Mapp* was decided. Linkletter must stay in jail; Miss Mapp, whose offense was committed before Linkletter's, is free. This different treatment of Miss Mapp and Linkletter points up at once the arbitrary and discriminatory nature of the judicial contrivance utilized here to break the promise of *Mapp* by keeping all people in jail who are unfortunate enough to have had their unconstitutional convictions affirmed before June 19, 1961." 381 U. S., at 641 (dissenting opinion).

I find any such reference to the calendar in determining the beneficiaries of constitutional pronouncements to be a grossly invidious discrimination. Miranda was interrogated on March 13, 1963; Tucker was interrogated more than three years later in April 1966. I can conceive of no principled way to deprive Tucker of the constitutional guarantees afforded Miranda. The reason put forward for refusing to apply the strictures of *Miranda* to interrogations which preceded the decision is that the purpose of *Miranda*'s rules is the deterrence of unconstitutional interrogation. "The inference I gather from these repeated statements is that the rule is not a right or privilege accorded to defendants charged with crime but is a sort of punishment against officers in order to keep them from depriving people of their constitutional rights. In passing I would say that if that is the sole purpose, reason, object and effect of the rule, the Court's action in adopting it sounds more like lawmaking than construing the Constitution." 381 U. S., at 649 (Black, J., dissenting). *Miranda*'s purpose was

not promulgation of judicially preferred standards for police interrogation, a function we are quite powerless to perform; the decision enunciated "*constitutional* standards for protection of the privilege" against self-incrimination. 384 U. S., at 491. People who are in jail because of a State's use of unconstitutionally derived evidence are entitled to a new trial, with the safeguards the Constitution provides, without regard to when the constitutional violation occurred, when the trial occurred, or when the conviction became "final."

As Mr. Justice Black said in *Linkletter:* "It certainly offends my sense of justice to say that a State holding in jail people who were convicted by unconstitutional methods has a vested interest in keeping them there that outweighs the right of persons adjudged guilty of crime to challenge their unconstitutional convictions at any time." 381 U. S., at 653.

I would affirm the judgment below.

BAKER ET AL., TRUSTEES IN REORGANIZATION *v.* GOLD SEAL LIQUORS, INC.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

No. 73-804. Argued April 23, 1974—Decided June 17, 1974

Petitioners, trustees of a railroad in a § 77 reorganization proceeding, brought suit for freight charges against respondent shipper, and respondent counterclaimed for cargo loss and damage. The District Court granted petitioners' motion for summary judgment for entry of one judgment on their claim and another on the counterclaim, but set off one judgment against the other, resulting in a net judgment against petitioners for some $11,000. The Court of Appeals affirmed. *Held:* The Court of Appeals erred in allowing the setoff, since it thereby granted a preference to the claim of one creditor that happened to owe freight charges over other creditors that did not, and thus interfered with the Reorganization Court's duty under § 77e, 11 U. S. C. § 205 (e), to approve a "fair and equitable plan" that duly recognizes the rights of each class of creditors and stockholders and does not discriminate unfairly in favor of any class. Pp. 468–474.

484 F. 2d 950, reversed.

DOUGLAS, J., wrote the opinion of the Court, in which BURGER, C. J., and BRENNAN, MARSHALL, WHITE, and BLACKMUN, JJ., joined. STEWART, J., filed an opinion concurring in the result, in which POWELL, J., joined, *post*, p. 474. REHNQUIST, J., filed a dissenting opinion, *post*, p. 478.

Paul R. Duke argued the cause for petitioners. With him on the brief was *John E. Wallace, Jr.*

Theodore J. Herst argued the cause and filed a brief for respondent.

Opinion of the Court by MR. JUSTICE DOUGLAS, announced by MR. JUSTICE WHITE.

The Penn-Central Transportation Co. is in bankruptcy reorganization under § 77 of the Bankruptcy Act, 11

U. S. C. § 205. Petitioners are its trustees authorized to collect its assets, one of which is a claim for freight charges against respondent owed the bankrupt debtor. The claim on which this suit was brought was $8,256.61 and the amount is undisputed. Respondent filed a counterclaim for $19,319.42 for loss and damage to shipments over the debtor's lines. Its amount is also not disputed.

The trustees filed a motion for summary judgment asking the District Court to enter one judgment covering the amount of freight charges admittedly due and another for the amount claimed by respondent.

Previously the Reorganization Court in the Third Circuit had prohibited the various bank creditors from offsetting their claims against the trustees of the debtor. 315 F. Supp. 1281. Prior to the decision of the instant case that bank setoff case was affirmed by the Court of Appeals, 453 F. 2d 520. Also prior to the ruling of the Court of Appeals in the instant case the Reorganization Court prohibited some shippers from setting off freight loss and damage claims against amounts owed for transportation claims. That order, 339 F. Supp. 603, was affirmed by the Court of Appeals, 477 F. 2d 841, and by this Court, *sub nom. United States Steel Corp.* v. *Trustees of Penn Central Transp. Co.*, 414 U. S. 885.

The District Court in the instant case granted the trustees' motion for summary judgment but set off one judgment against the other, which resulted in a net judgment in favor of respondent against the trustees in the amount of $11,017.01. The Court of Appeals affirmed, 484 F. 2d 950, and we granted certiorari to resolve the conflict.

We reverse.

Ordinarily where a court has primary jurisdiction over the parties and over the subject matter, the power to resolve the amount of the claim and the counterclaim is

clear. Indeed, under the Federal Rules of Civil Procedure the counterclaim may be compulsory. Rule 13 (a).[1] That is the procedure under § 68 of the Bankruptcy Act, 11 U. S. C. § 108.[2]

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[1] Rule 13 (a), the compulsory-counterclaim rule, requires a defendant to plead any counterclaim which "arises out of the transaction or occurrence that is the subject matter of the opposing party's claim and does not require for its adjudication the presence of third parties of whom the court cannot acquire jurisdiction." The claim is not compulsory if it was the subject of another pending action at the time the action was commenced, or if the opposing party brought his suit by attachment or other process not resulting in personal jurisdiction but only *in rem* or *quasi in rem* jurisdiction. A counterclaim which is compulsory but is not brought is thereafter barred, *e. g., Mesker Bros. Iron Co.* v. *Donata Corp.*, 401 F. 2d 275, 279.

If a counterclaim is compulsory, the federal court will have ancillary jurisdiction over it even though ordinarily it would be a matter for a state court, *e. g., Great Lakes Rubber Corp.* v. *Herbert Cooper Co.*, 286 F. 2d 631. Under Rule 13 (a)'s predecessor this Court held that "transaction" is a word of flexible meaning which may comprehend a series of occurrences if they have logical connection, *Moore* v. *New York Cotton Exchange*, 270 U. S. 593, and this is the rule generally followed by the lower courts in construing Rule 13 (a), *e. g., Great Lakes, supra; United Artists Corp.* v. *Masterpiece Productions*, 221 F. 2d 213, 216.

Rule 13 (b) permits as counterclaims, although not compulsory, "any claim against an opposing party not arising out of the transaction or occurrence that is the subject matter of the opposing party's claim." Thus the court may dispose of all claims between the parties in one proceeding whether or not they arose in the "same transaction."

[2] Title 11 U. S. C. § 108 provides:

"(a) In all cases of mutual debts or mutual credits between the estate of a bankrupt and a creditor the account shall be stated and one debt shall be set off against the other, and the balance only shall be allowed or paid.

"(b) A set-off or counterclaim shall not be allowed in favor of any debtor of the bankrupt which (1) is not provable against the estate and allowable under subdivision (g) of section 93 of this title; or

The problem of the bankruptcy Reorganization Court is somewhat different. Liquidation is not the objective. Rather, the aim is by financial restructuring to put back into operation a going concern.[3] That entails two basic considerations:

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(2) was purchased by or transferred to him after the filing of the petition or within four months before such filing with a view to such use and with knowledge or notice that such bankrupt was insolvent or had committed an act of bankruptcy."

If the trustee in ordinary bankruptcy goes into a court that has jurisdiction and asserts a claim, the debtor of the bankrupt may raise as a setoff any claim he has against the bankrupt and the court ordinarily issues only one judgment for the difference.

In a straight bankruptcy case, *Cumberland Glass Co.* v. *De Witt*, 237 U. S. 447, the Court construed § 68 as "permissive rather than mandatory" and as to which the bankruptcy court "exercises its discretion . . . upon the general principles of equity." *Id.*, at 455. And see *Susquehanna Chemical Corp.* v. *Producers Bank & Trust Co.*, 174 F. 2d 783.

[3] The dissent places mistaken reliance on subsection *l* of § 77 of the Bankruptcy Act, 11 U. S. C. § 205 (*l*), to argue that the setoff provision of § 68, 11 U. S. C. § 108, necessarily applies to all reorganization proceedings under § 77. No authority is cited for this novel construction of subsection *l*, and indeed the very wording of the subsection itself makes clear that it applies only when "consistent with the provisions" of § 77. We have long held that the distinctive purposes of § 77 may require different procedures than would be followed in ordinary bankruptcy. For example, in holding that under § 77 the Reorganization Court had authority to enjoin the sale of collateral if it would hinder or obstruct the preparation of a reorganization plan, we stated: "It may be that in an ordinary bankruptcy proceeding the issue of an injunction in the circumstances here presented would not be sustained. As to that it is not necessary to express an opinion. But a proceeding under § 77 is not an ordinary proceeding in bankruptcy. It is a special proceeding which seeks only to bring about a reorganization, if a satisfactory plan to that end can be devised. And to prevent the attainment of that object is to defeat the very end the accomplishment of which was the sole aim of the section, and thereby to render its pro-

First is the collection of amounts owed the bankrupt to keep its cash inflow sufficient for operating purposes, at least at the survival levels. The second is to design a plan [4] which creditors [5] and other claimants will approve, which will pass scrutiny of the Interstate Commerce Commission, which will meet the fair-and-equitable standards required by the Act for court approval, and which will preserve an ongoing railroad in the public interest.[6]

Section 77a gives the Reorganization Court "exclusive jurisdiction of the debtor and its property wherever located." [7] 11 U. S. C. § 205 (a). In furtherance of its

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visions futile." *Continental Bank* v. *Rock Island R. Co.*, 294 U. S. 648, 676. And see *New Haven Inclusion Cases*, 399 U. S. 392, 420.

Ordinary bankruptcy aims at liquidation of a business. Reorganization under § 77 aims at a continuation of the old business under a new capital structure that respects the relative priorities of the various claimants.

[4] Section 77b, 11 U. S. C. § 205 (b), defines a "plan of reorganization." The provisions for filing a "plan" with the court and with the Interstate Commerce Commission are governed by § 77d, 11 U. S. C. § 205 (d).

[5] Unsecured creditors have the priority they would have had "if a receiver in equity of the property of the debtor had been appointed by a Federal court on the day of the approval" of the bankruptcy petition and shall be treated as a separate class or classes. 11 U. S. C. § 205 (b). As to that priority see *Gregg* v. *Metropolitan Trust Co.*, 197 U. S. 183. In *St. Louis & S. F. R. Co.* v. *Spiller*, 274 U. S. 304, 311, the Court said: "[B]y long established practice, the doctrine has been applied only to unpaid expenses incurred within six months prior to the appointment of the receivers. . . . The cases in which this time limit was not observed, are few in number and exceptional in character."

[6] *New Haven Inclusion Cases, supra*, at 420.

[7] Section 77a provides in relevant part: "If the petition is so approved, the court in which the order is entered shall, during the pendency of the proceedings under this section and for the purposes thereof, have exclusive jurisdiction of the debtor and its property wherever located, and shall have and may exercise in addition to the powers conferred by this section all the powers, not inconsistent with this section, which a court of the United States would have had if it

long-range responsibilities the Reorganization Court enjoined secured creditors from selling collateral to reduce their claims.[8] It then went on to bar enforcement of liens against the debtor, taking possession of its property, or obtaining judgments against the debtor, except for specified purposes.[9] One court seized upon the last provision in the order which says "that suits or claims for damages caused by the operation of trains, buses, or

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had appointed a receiver in equity of the property of the debtor for any purpose. Process of the court shall extend to and be valid when served in any judicial district."

As MR. JUSTICE STEWART correctly notes, *infra*, at 476, it is settled that "property" within the meaning of this section includes intangibles such as choses in action.

[8] The order provided in part: "All persons, firms and corporations, holding collateral heretofore pledged by the Debtor as security for its notes or obligations or holding for the account of the Debtor deposit balances or credits be and each of them hereby are [*sic*] restrained and enjoined from selling, converting or otherwise disposing of such collateral, deposit balances or other credits, or any part thereof, or from offsetting the same, or any [*sic*] thereof, against any obligation of the Debtor, until further order of this Court."

[9] "All persons and all firms and corporations, whatsoever and wheresoever situated, located or domiciled, hereby are restrained and enjoined from interfering with, seizing, converting, appropriating, attaching, garnisheeing, levying upon, or enforcing liens upon, or in any manner whatsoever disturbing any portion of the assets, goods, money, deposit balances, credits, choses in action, interests, railroads, properties or premises belonging to, or in the possession of the Debtor as owner, lessee or otherwise, or from taking possession of or from entering upon, or in any way interfering with the same, or any part thereof, or from interfering in any manner with the operation of said railroads, properties or premises or the carrying on of its business by the Debtor under the order of this Court and from commencing or continuing any proceeding against the Debtor, whether for obtaining or for the enforcement of any judgment or decree or for any other purpose, provided that suits or claims for damages caused by the operation of trains, buses, or other means of transportation may be filed and prosecuted to judgment in any Court of competent jurisdiction . . . ."

other means of transportation may be filed and prosecuted to judgment in any Court of competent jurisdiction," to adjudicate the merits of a counterclaim, but declined to allow the setoff.[10] But proof of the claim against the debtor is a distinct preliminary stage to a determination of what priority, if any, the claim that is proved receives in a reorganization plan.

There is a hierarchy of claims, the owner of the equity coming last. Wages owing workers running the trains have a high current priority. Secured creditors have by law a priority in the hierarchy. Unsecured creditors usually are pooled together. They may receive new securities, perhaps stock. Allowance of a setoff that reduces all or part of the debtor's claim against them is a form of priority. The guiding principle governing priorities is stated in § 77e (1), 11 U. S. C. § 205 (e)(1): the Reorganization Court shall approve a plan if it "is fair and equitable, affords due recognition to the rights of each class of creditors and stockholders, does not discriminate unfairly in favor of any class of creditors or stockholders, and will conform to the requirements of the law of the land regarding the participation of the various classes of creditors and stockholders."

The term "fair and equitable" has a long history going back at least to *Northern Pacific R. Co.* v. *Boyd,* 228 U. S. 482, and *Kansas City Terminal R. Co.* v. *Central Union Trust Co.,* 271 U. S. 445, whose fixed principle has been carried over into § 77e by our decisions.[11] The plan

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[10] *Baker* v. *Southeastern Michigan Shippers Assn.,* 376 F. Supp. 149.

[11] *Ecker* v. *Western Pacific R. Corp.,* 318 U. S. 448, 477–483; *Group of Investors* v. *Milwaukee R. Co.,* 318 U. S. 523, 539–541; *RFC* v. *Denver & R. G. W. R. Co.,* 328 U. S. 495, 516–520. The same is true under § 101 *et seq.* (now c. X) of the Bankruptcy Act, 11 U. S. C. § 501 *et seq. Consolidated Rock Products Co.* v. *Du Bois,* 312 U. S. 510.

is by the terms of § 77 a product of the Interstate Commerce Commission and the Reorganization Court working cooperatively together, *New Haven Inclusion Cases*, 399 U. S. 392, 431. The public interest, as well as the interests of creditors and stockholders, is at issue.[12] *RFC* v. *Denver & R. G. W. R. Co.*, 328 U. S. 495, 535.

The allowance or disallowance of setoff may seem but a minor part of the architectural problem. But to the extent that it is allowed, it grants a preference to the claim of one creditor over the others by the happenstance that it owes freight charges that the others do not. That is a form of discrimination to which the policy of § 77 is opposed. As a general rule of administration for § 77 Reorganization Courts, the setoff should not be allowed.[13]

Reversed.

MR. JUSTICE STEWART, with whom MR. JUSTICE POWELL joins, concurring in the result.

The Court concludes that since the allowance of a setoff in a § 77 reorganization would grant "a preference to the claim of one creditor over the others by the happenstance that it owes freight charges that the others do not," such setoffs should be disallowed "[a]s a general rule of administration." *Ante*, this page. While I agree that the District Court should not have permitted a setoff in this case, I think that the broad rule adopted by

[12] And see *New Haven Inclusion Cases*, 399 U. S., at 420.

[13] *Lowden* v. *Northwestern National Bank & Trust Co.*, 298 U. S. 160, is not to the contrary. The Court there refused to answer the certified question because it did not know the factual setting in which the question had been raised. Much law has been fashioned in the reorganization field since 1936, the date of that decision. The contours of plans have emerged which have given new meaning and insight into the statutory words "fair and equitable." The preference sought here shows no exceptional circumstances which in equity justify the discrimination.

the Court is unnecessary to reach this result, and I prefer to rest my conclusion on a narrower ground.

While judicial setoffs are specifically authorized in straight bankruptcy cases, § 68 of the Bankruptcy Act, 11 U. S. C. § 108, no express approval of them appears in the statute governing § 77 reorganizations.[1] In *Lowden* v. *Northwestern National Bank & Trust Co.*, 298 U. S. 160 (1936), this Court stated that the approval of setoffs in § 68 did not control in railroad reorganizations but "governs, if at all, by indirection and analogy according to the circumstances. The rule to be accepted for the purpose of such a suit is that enforced by courts of equity, which differs from the rule in bankruptcy chiefly in its greater flexibility, the rule in bankruptcy being framed in adaptation to standardized conditions, and that in equity varying with the needs of the occasion, though remaining constant, like the statute, in the absence of deflecting forces." *Id.*, at 164–165.[2]

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[1] I am unable to conclude, as does the dissent, *post*, at 479–480, that subsection *l* of § 77 mandates allowance in § 77 reorganizations of all setoffs allowed by § 68 in straight bankruptcies. While the dissent's ingenious reading of the statute would provide an easy semantic solution to the problem presented in this case, I am impressed with the fact that neither this Court in *Lowden* v. *Northwestern National Bank & Trust Co.*, 298 U. S. 160 (1936), nor, apparently, any other federal trial or appellate court has considered subsection *l* to have any bearing whatsoever on the setoff problem. In the absence of any showing based on legislative history that such was the intent of Congress, and particularly in the absence of any briefing or oral argument on the matter, I would not, therefore, give this less-than-pellucid provision the force ascribed to it by the dissenting opinion.

[2] These statements of the Court concerning allowance of judicial setoffs in § 77 cases were, in a technical sense, dicta. The *Lowden* case came to the Court on questions certified by the Court of Appeals for the Eighth Circuit, and the Court dismissed the certificate without formally answering the questions because of the "defec-

By announcing a doctrine barring judicial setoffs as a "general rule" the Court in the present case adopts a rationale inconsistent with *Lowden*, which quite clearly envisioned a case-by-case analysis of the propriety of each attempted setoff in the light of equitable considerations. Rather than replacing this principle with a new and wholly inconsistent rule to be applied in all cases involving judicial setoffs, I would rest this decision on the particular facts before us, which adequately distinguish this case from the situation in *Lowden*.[3]

Section 77a gives the Reorganization Court *"exclusive jurisdiction* of the debtor and *its property wherever located."* (Emphasis added.) It has been commonly accepted in the federal courts that "property" within the meaning of this section includes intangibles such as choses in action. See 2 W. Collier, Bankruptcy ¶ 23.05 [4], p. 485 (1971), and cases there cited. It follows, therefore, that respondent's debt to the Penn Central fell within the "exclusive jurisdiction" of the Reorganization Court immediately upon the approval of the petition for reorganization. While such jurisdiction may not empower the Reorganization Court to *enforce* the cause of action, see *id.*, at 489–490; *In re Roman*, 23 F. 2d 556 (CA2 1928) (L. Hand, J.), it certainly does empower the

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tive form of the certificate . . . ." 298 U. S., at 166. The Court's reasoning as to the availability of setoffs, however, has been viewed as authoritative. See, *e. g.*, *In re Lehigh & Hudson River R. Co.*, 468 F. 2d 430, 433 (CA2 1972); *In re Yale Express System*, 362 F. 2d 111, 116–117 (CA2 1966); *Susquehanna Chemical Corp.* v. *Producers Bank & Trust Co.*, 174 F. 2d 783, 787 (CA3 1949). See also 4 W. Collier, Bankruptcy ¶ 68.10 [2], pp. 898–900, n. 17 (1971).

[3] Because of my view of this case I need not comment on the propriety of the rule adopted by the Court, although I think there are strong arguments that the rule can be unfair, see, *e. g.*, *In re Lehigh & Hudson River R. Co.*, *supra*, at 434, and that those arguments are not dealt with in the Court's opinion today.

court to protect the "property" and to immunize it from diminution through setoff or counterclaim. To hold otherwise would be inconsistent with the function of the Reorganization Court to consolidate and protect the assets of the petitioning corporation. *Callaway* v. *Benton*, 336 U. S. 132, 147 (1949); *Warren* v. *Palmer*, 310 U. S. 132, 139–141 (1940); *Ex parte Baldwin*, 291 U. S. 610, 615 (1934).

While the matter is not wholly free from doubt, I am persuaded that the Reorganization Court in this proceeding did in fact enjoin the allowance by any other court of judicial setoffs against any debts owed to the Penn Central.[4] On this basis I join the judgment of the Court.

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[4] The Reorganization Court's initial order approving the Penn Central's petition for reorganization, filed on June 21, 1970, contained the following provisions:

"9. All persons and all firms and corporations, whatsoever and wheresoever situated, located or domiciled, hereby are restrained and enjoined from interfering with, seizing, converting, appropriating, attaching, garnisheeing, levying upon, or enforcing liens upon, or in any manner whatsoever disturbing any portion of the assets, goods, money, deposit balances, credits, choses in action, interests, railroads, properties or premises belonging to, or in the possession of the Debtor as owner, lessee or otherwise, or from taking possession of or from entering upon, or in any way interfering with the same, or any part thereof, or from interfering in any manner with the operation of said railroads, properties or premises or the carrying on of its business by the Debtor under the order of this Court and from commencing or continuing any proceeding against the Debtor, whether for obtaining or for the enforcement of any judgment or decree or for any other purpose, provided that suits or claims for damages caused by the operation of trains, buses, or other means of transportation may be filed and prosecuted to judgment in any Court of competent jurisdiction, and provided, further, that the title of any owner, whether as trustee or otherwise, to rolling stock equipment leased or conditionally sold to the Debtor, and any right of such owner to take possession of such property in compliance with

MR. JUSTICE REHNQUIST, dissenting.

The question in this case is whether the United States District Court for the Northern District of Illinois, wherein petitioners filed their claim for money damages against respondent, and the Court of Appeals for the Seventh Circuit, which affirmed the District Court's order setting off respondent's claim against petitioners, acted within the permissible limits of their discretion. The statute most closely in point is § 68a of the Bankruptcy Act, 11 U. S. C. § 108, which provides:

> "(a) In all cases of mutual debts or mutual credits between the estate of a bankrupt and a creditor the account shall be stated and one debt shall be set off against the other, and the balance only shall be allowed or paid."

In the only case of this Court dealing with the applicability of § 68a to railroad reorganizations, the Court said:

> "[T]he trustees must have the power to gather in the assets and keep the business going. To exercise that power, they may find it necessary to sue, and the suit may turn upon the right of set-off, as it does in the case at hand. In a suit for such a purpose, a suit collateral to the main proceeding and initiated at a time when the outcome of that pro-

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the provisions of any such lease or conditional sale contract, shall not be affected by the provisions of this order.

"10. All persons, firms and corporations, holding collateral heretofore pledged by the Debtor as security for its notes or obligations or holding for the account of the Debtor deposit balances or credits be and each of them hereby [is] restrained and enjoined from selling, converting or otherwise disposing of such collateral, deposit balances or other credits, or any part thereof, or from offsetting the same, or any part thereof, against any obligation of the Debtor, until further order of this Court."

> ceeding is still unknown and unknowable, § 68 of the statute does not control the disposition of the controversy *ex proprio vigore.* It governs, if at all, by indirection and analogy according to the circumstances. . . ." *Lowden* v. *Northwestern National Bank & Trust Co.,* 298 U. S. 160, 164 (1936). "When all the facts are known, they may be found to offer no excuse for a departure from the rule in bankruptcy which, as indicated already, is generally, even if not always, the rule in equity as well." *Id.,* at 166.

The Court's opinion in *Lowden, supra,* makes no mention of subsection *l* of § 77 of the Bankruptcy Act, 11 U. S. C. § 205 (*l*), which provides in pertinent part as follows:

> "(*l*) *Jurisdiction of court, duties of debtor and rights of creditors same as in voluntary bankruptcy.*
>
> "In proceedings under this section and consistent with the provisions thereof, the jurisdiction and powers of the court, the duties of the debtor and the rights and liabilities of creditors, and of all persons with respect to the debtor and its property, shall be the same as if a voluntary petition for adjudication had been filed and a decree of adjudication had been entered on the day when the debtor's petition was filed."

Section 77, in turn, was a part of the Act of Mar. 3, 1933, c. 204, 47 Stat. 1467, which added Chapter VIII to the Bankruptcy Act. Any lingering doubt that the term "voluntary petition for adjudication" in subsection *l* refers to ordinary bankruptcy proceedings is dispelled by an examination of § 73, which was the first section of that Act:

> "Sec. 73. Additional Jurisdiction.—In addition to the jurisdiction exercised in voluntary and involun-

> tary proceedings to adjudge persons bankrupt, courts of bankruptcy shall exercise original jurisdiction in proceedings for the relief of debtors, as provided in sections 74, 75, and 77 of this Act." 47 Stat. 1467.

The language of subsection *l* of § 77, even more emphatically than the *Lowden* decision, would seem to unconditionally mandate the application of the rule regarding setoffs contained in § 68 of the Bankruptcy Act to railroad reorganizations such as this.

Subsection a of § 77, 11 U. S. C. § 205 (a), giving the Reorganization Court "exclusive jurisdiction of the debtor and its property wherever located," upon which the Court's opinion heavily relies, seems to me to have virtually nothing to do with this case. We are not dealing with property that was actually or constructively in the possession of the trustees at the time of the commencement of the reorganization proceedings, nor are we dealing with a creditor who in any way submitted itself to the jurisdiction of the Reorganization Court in the Eastern District of Pennsylvania.

This is a simple contract claim for freight charges on the part of the trustees, against which the respondent has sought to set off a concededly valid claim for damage in transit. While the Reorganization Court undoubtedly had plenary authority over the trustees, and over the "property" of the debtor, it certainly does not have such jurisdiction over whatever funds of respondent might be used to satisfy a judgment against it in favor of the trustees. The trustees' "property" in this case is a chose in action and under no conceivable circumstances could § 77 authorize the summary determination of the claim in this case.

> "[T]he bankruptcy court does not have summary jurisdiction to *enforce* a chose in action against the bankrupt's obligor, even when the bankrupt's rights

> seem clear. . . ." *In re Lehigh & Hudson River R. Co.*, 468 F. 2d 430, 433 (CA2 1972) (Friendly, C. J.). "Even though [the obligor's] refusal were no better than colorable, its property remained its own; it had only broken its promise, and, like any other promisor, was liable to an action for damages. . . . It would not be permissible to collect even a bank deposit due a bankrupt by these means." *In re Roman*, 23 F. 2d 556, 558 (CA2 1928) (L. Hand, J.).

Cases such as *Ex parte Baldwin*, 291 U. S. 610 (1934), and *Warren* v. *Palmer*, 310 U. S. 132 (1940), do no more than reaffirm the well-established doctrine that the jurisdiction of the bankruptcy court over the property of the debtor is exclusive. They do not touch upon the case before us, where the trustees have chosen to convert the chose in action, which is concededly the property of the debtor and subject to the jurisdiction of the Reorganization Court, into a money judgment in another forum.

Callaway v. *Benton*, 336 U. S. 132 (1949), though not on all fours with the present case, can hardly be said to support the result reached by the Court. There an action had been brought in the state courts of Georgia to enjoin the board of directors of a corporation which had leased trackage to the Central of Georgia Railway from consenting to the plan of reorganization which had been proposed on behalf of Central of Georgia, which was a debtor in a § 77 proceeding. The bankruptcy court had in turn enjoined this litigation on the ground that it interfered with the exclusive jurisdiction of the bankruptcy court. This Court reversed that determination saying:

> "We have held that a court of bankruptcy has exclusive and nondelegable control over the administration of an estate in its possession. *Thompson* v. *Magnolia Petroleum Co.*, 309 U. S. 478 (1940); *Isaacs* v.

Hobbs Tie & T. Co., 282 U. S. 734 (1931). There can be no question, however, that Congress did not give the bankruptcy court exclusive jurisdiction over all controversies that in some way affect the debtor's estate." 336 U. S., at 142 (footnote omitted).

If we accept *Lowden* as the final word from this Court on the question, even though the opinion nowhere refers to the language of subsection *l*, which on its face would carry over the rule of § 68 bag and baggage, the most that can be said in favor of the petitioners here is that the District Court in which suit is brought has discretion as to whether or not a setoff should be allowed.

Nothing could be more inconsistent with *Lowden* than the flat order of the Reorganization Court in this case, entered at the commencement of the reorganization proceedings, to the effect that *no* setoffs were to be allowed, unless it be that part of the Court's opinion in this case stating that "[a]s a general rule of administration for § 77 Reorganization Courts, the setoff should not be allowed." *Ante*, at 474. And it seems a sufficient answer to the Court's observation that the allowance of a setoff grants a preference, *ante*, at 473, to say that the Bankruptcy Act's strictures against preferences apply with as much force to ordinary bankruptcies as to reorganizations, and yet § 68 of the Act specifically allows this type of "preference" in an ordinary bankruptcy proceeding.

It may be that upon a proper showing to the District Court for the Northern District of Illinois the trustees could have satisfied that court that the allowance of a setoff in this case would be inconsistent with higher priorities of the reorganization. But no such showing was made by the trustees, and they were content to rely on the *ex parte* order of the Reorganization Court which made no pretense of considering matters on a case-by-

case basis. The District Court for the Northern District of Illinois was, therefore, in my opinion, justified in authorizing the setoff under the doctrine of *Lowden,* and the Court of Appeals for the Seventh Circuit was correct in affirming its judgment.

GEDULDIG, DIRECTOR, DEPARTMENT OF HUMAN RESOURCES DEVELOPMENT *v.* AIELLO ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA

No. 73-640. Argued March 26, 1974—Decided June 17, 1974

California has a disability insurance system for private employees temporarily disabled from working by an injury or illness not covered by workmen's compensation, under which an employee contributes to an Unemployment Compensation Disability Fund one percent of his salary up to an annual maximum of $85. A disability lasting less than eight days is not compensable, except when the employee is hospitalized. Benefits are not payable for a single disability exceeding 26 weeks. A disability resulting from an individual's court commitment as a dipsomaniac, drug addict, or sexual psychopath is not compensable, nor are certain disabilities attributable to pregnancy. Appellees, four women otherwise qualified under the program who have suffered employment disability because of pregnancies, only one of which was normal, challenged the pregnancy exclusion. A three-judge District Court upheld their contention that the exclusion violated the Equal Protection Clause. The court denied a motion to reconsider based on a state appellate court ruling, in which appellant who administers the program has acquiesced, confining the exclusion to only normal pregnancies. The California program, in terms of the level of benefits and risks insured, is structured to maintain the solvency of the Disability Fund at a one-percent annual level of contribution. The District Court acknowledged that coverage of disabilities resulting from normal pregnancies would entail substantial additional expense. But it concluded that this increased cost could be accommodated through adjustments in the rate of employee contribution, the maximum benefits payable, "and the other variables affecting the solvency of the program." *Held:*

1. The appellate ruling and administrative guidelines excluding only normal pregnancies have mooted the case as to the three appellees who had abnormal pregnancies and whose claims have now been paid. Pp. 491–492.

2. California's decision not to insure under its program the risk of disability resulting from normal pregnancy does not constitute an invidious discrimination violative of the Equal Protection Clause. The program does not discriminate with respect to the persons or groups eligible for its protection, and there is no evidence that it discriminates against any definable group or class in terms of the aggregate risk protection derived from the program. The sole contention is the asserted underinclusiveness of the program's coverage as a result of the exclusion of disabilities resulting from normal pregnancy. The State is not required by the Equal Protection Clause to sacrifice the self-supporting nature of the program, reduce the benefits payable for covered disabilities, or increase the maximum employee contribution rate just to provide protection against another risk of disability, such as normal pregnancy. "[T]he Equal Protection Clause does not require that a State must choose between attacking every aspect of a problem or not attacking the problem at all." *Dandridge* v. *Williams*, 397 U. S. 471, 486–487. Pp. 492–497.

359 F. Supp. 792, reversed.

STEWART, J., delivered the opinion of the Court, in which BURGER, C. J., and WHITE, BLACKMUN, POWELL, and REHNQUIST, JJ., joined. BRENNAN, J., filed a dissenting opinion, in which DOUGLAS and MARSHALL, JJ., joined, *post*, p. 497.

Joanne Condas, Deputy Attorney General of California, argued the cause for appellant. With her on the briefs were *Evelle J. Younger*, Attorney General, and *Elizabeth Palmer*, Assistant Attorney General.

Wendy W. Williams argued the cause for appellees. With her on the briefs were *Peter Hart Weiner*, *Roland C. Davis*, and *Victor J. Van Bourg*.*

*Briefs of *amici curiae* urging reversal were filed by *Milton A. Smith*, *Gerard C. Smetana*, *Lawrence D. Ehrlich*, and *Jerry Kronenberg* for the Chamber of Commerce of the United States; by *Ronald A. Zumbrun* and *Raymond M. Momboisse* for the Pacific Legal Foundation; by *Richard D. Godown* and *Myron G. Hill, Jr.*, for the National Association of Manufacturers of the United States; by *Willard Z. Carr, Jr.*, for the Merchants and Manufacturers Assn.;

MR. JUSTICE STEWART delivered the opinion of the Court.

For almost 30 years California has administered a disability insurance system that pays benefits to persons in private employment who are temporarily unable to work because of disability not covered by workmen's compensation. The appellees brought this action to challenge the constitutionality of a provision of the California program that, in defining "disability," excludes from coverage certain disabilities resulting from pregnancy. Because the appellees sought to enjoin the enforcement of this state statute, a three-judge court was convened pursuant to 28 U. S. C. §§ 2281 and 2284.[1] On

by *F. Mark Garlinghouse* and *James D. Hutchinson* for the American Telephone and Telegraph Co.; and by *Theophil C. Kammholz, Stanley R. Strauss, John S. Battle, Jr.*, and *J. Robert Brame III* for the General Electric Co.

Briefs of *amici curiae* urging affirmance were filed by *Joseph T. Eddins* and *Beatrice Rosenberg* for the United States Equal Employment Opportunity Commission; by *Ruth Bader Ginsburg* and *Melvin L. Wulf* for the American Civil Liberties Union et al.; by *J. Albert Woll, Laurence Gold*, and *Thomas E. Harris* for the American Federation of Labor and Congress of Industrial Organizations; by *Winn Newman* and *Ruth Weyand* for the International Union of Electrical, Radio and Machine Workers, AFL–CIO–CLC; by *Joseph N. Onek* for Women's Equity Action League et al.; and by *Harry I. Rand* for the Physicians Forum.

[1] This litigation began as two separate suits on behalf of California employees who had paid sufficient amounts into the Disability Fund to be eligible generally for benefits under the program. Carolyn Aiello brought her suit against appellant in the Federal District Court. Augustina Armendariz, Elizabeth Johnson, and Jacqueline Jaramillo jointly initiated their suit as a petition for a writ of mandate in the California Supreme Court. Both suits were brought as class actions and asserted the unconstitutionality of § 2626 of the California Unemployment Insurance Code under the Equal Protection Clause of the Fourteenth Amendment. The appellant removed the state court suit to the Federal District Court, where the two actions were consolidated. See 28 U. S. C. § 1441 (b).

the appellees' motion for summary judgment, the District Court, by a divided vote, held that this provision of the disability insurance program violates the Equal Protection Clause of the Fourteenth Amendment, and therefore enjoined its continued enforcement. 359 F. Supp. 792. The District Court denied a motion to stay its judgment pending appeal. The appellant thereupon filed a similar motion in this Court, which we granted. 414 U. S. 897. We subsequently noted probable jurisdiction of the appeal. 414 U. S. 1110.

I

California's disability insurance system is funded entirely from contributions deducted from the wages of participating employees. Participation in the program is mandatory unless the employees are protected by a voluntary private plan approved by the State.[2] Each employee is required to contribute one percent of his salary, up to an annual maximum of $85.[3] These contributions are placed in the Unemployment Compensation Disability Fund, which is established and administered as a special trust fund within the state treasury.[4] It is from this Disability Fund that benefits under the program are paid.

An individual is eligible for disability benefits if, during a one-year base period prior to his disability, he has contributed one percent of a minimum income of $300 to the Disability Fund.[5] In the event he suffers a compensable disability, the individual can receive a "weekly benefit amount" of between $25 and $105, depending on the amount he earned during the highest quarter of the

[2] Cal. Unemp. Ins. Code §§ 3251–3254.

[3] §§ 984, 985, 2901.

[4] § 3001.

[5] § 2652.

base period.[6] Benefits are not paid until the eighth day of disability, unless the employee is hospitalized, in which case benefits commence on the first day of hospitalization.[7] In addition to the "weekly benefit amount," a hospitalized employee is entitled to receive "additional benefits" of $12 per day of hospitalization.[8] "Weekly benefit amounts" for any one disability are payable for 26 weeks so long as the total amount paid does not exceed one-half of the wages received during the base period.[9] "Additional benefits" for any one disability are paid for a maximum of 20 days.[10]

In return for his one-percent contribution to the Disability Fund, the individual employee is insured against the risk of disability stemming from a substantial number of "mental or physical illness[es] and mental or physical injur[ies]." Cal. Unemp. Ins. Code § 2626. It is not every disabling condition, however, that triggers the obligation to pay benefits under the program. As already noted, for example, any disability of less than eight days' duration is not compensable, except when the employee is hospitalized. Conversely, no benefits are payable for any single disability beyond 26 weeks. Further, disability is not compensable if it results from the individual's court commitment as a dipsomaniac, drug addict, or sexual psychopath.[11] Finally, § 2626 of the Unem-

[6] § 2655. This provision has been amended, effective July 1, 1974, to provide for a maximum weekly benefit amount of $119.

[7] §§ 2627 (b) and 2802.

[8] § 2801.

[9] § 2653.

[10] § 2801. Section 2608 provides a formula for determining whether a disabling condition that is intermittent is one disability or more than one disability for purposes of applying the limitations in §§ 2653 and 2801 on the maximum amount of benefits payable.

[11] § 2678. Sections 2675–2677 contain various other factors that will disqualify an employee from receiving benefits but that relate to matters other than the nature of the disabling condition.

ployment Insurance Code excludes from coverage certain disabilities that are attributable to pregnancy. It is this provision that is at issue in the present case.

Appellant is the Director of the California Department of Human Resources Development.[12] He is responsible for the administration of the State's disability insurance program. Appellees are four women who have paid sufficient amounts into the Disability Fund to be eligible for benefits under the program. Each of the appellees became pregnant and suffered employment disability as a result of her pregnancy. With respect to three of the appellees, Carolyn Aiello, Augustina Armendariz, and Elizabeth Johnson, the disabilities were attributable to abnormal complications encountered during their pregnancies.[13] The fourth, Jacqueline Jaramillo, experienced a normal pregnancy, which was the sole cause of her disability.

At all times relevant to this case, § 2626 of the Unemployment Insurance Code provided:

> " 'Disability' or 'disabled' includes both mental or physical illness and mental or physical injury. An individual shall be deemed disabled in any day in which, because of his physical or mental condition, he is unable to perform his regular or customary work. *In no case shall the term 'disability' or 'disabled' include any injury or illness caused by or arising in connection with pregnancy up to the termination of such pregnancy and for a period of 28 days thereafter.*" (Emphasis added.)

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[12] Effective July 1, 1974, the Department of Human Resources Development will be renamed the Department of Employment Development. See Cal. Unemp. Ins. Code § 301 *et seq.*

[13] Aiello and Johnson suffered ectopic and tubal pregnancies, respectively, which required surgery to terminate the pregnancies. Armendariz suffered a miscarriage.

Appellant construed and applied the final sentence of this statute to preclude the payment of benefits for any disability resulting from pregnancy. As a result, the appellees were ruled ineligible for disability benefits by reason of this provision, and they sued to enjoin its enforcement. The District Court, finding "that the exclusion of pregnancy-related disabilities is not based upon a classification having a rational and substantial relationship to a legitimate state purpose," held that the exclusion was unconstitutional under the Equal Protection Clause. 359 F. Supp., at 801.

Shortly before the District Court's decision in this case, the California Court of Appeal, in a suit brought by a woman who suffered an ectopic pregnancy, held that § 2626 does not bar the payment of benefits on account of disability that results from medical complications arising during pregnancy. *Rentzer* v. *Unemployment Insurance Appeals Board*, 32 Cal. App. 3d 604, 108 Cal. Rptr. 336 (1973).[14] The state court construed the statute to preclude only the payment of benefits for disability accompanying normal pregnancy.[15] The appel-

[14] In an earlier decision, the Court of Appeal had sustained § 2626 against an equal protection challenge by a female employee who had suffered disability as a result of normal pregnancy and delivery. *Clark* v. *California Employment Stabilization Comm'n*, 166 Cal. App. 2d 326, 332 P. 2d 716 (1958).

[15] Section 2626 was later amended, and a new § 2626.2 was added, in order clearly to reflect this interpretation. The two sections now provide as follows:

§ 2626 "'Disability' or 'disabled' includes both mental or physical illness, mental or physical injury, and, to the extent specified in Section 2626.2, pregnancy. An individual shall be deemed disabled in any day in which, because of his physical or mental condition, he is unable to perform his regular or customary work."

§ 2626.2 "Benefits relating to pregnancy shall be paid under this part only in accordance with the following:

"(a) Disability benefits shall be paid upon a doctor's certification

lant acquiesced in this construction and issued administrative guidelines that exclude only the payment of "maternity benefits"—*i. e.*, hospitalization and disability benefits for normal delivery and recuperation.

Although *Rentzer* was decided some 10 days before the District Court's decision in this case, there was apparently no opportunity to call the court's attention to it. The appellant, therefore, asked the court to reconsider its decision in light of the construction that the California Court of Appeal had given to § 2626 in the *Rentzer* case. By a divided vote, the court denied the motion for reconsideration. Although a more definitive ruling would surely have been preferable, we interpret the District Court's denial of the appellant's motion as a determination that its decision was not affected by the limiting construction given to § 2626 in *Rentzer*.

Because of the *Rentzer* decision and the revised administrative guidelines that resulted from it, the appellees Aiello, Armendariz, and Johnson, whose disabilities were attributable to causes other than normal pregnancy and delivery, became entitled to benefits under the disability insurance program, and their claims have since been paid. With respect to appellee Jaramillo, however, whose disability stemmed solely from normal pregnancy and childbirth, § 2626 continues to bar the

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that the claimant is disabled because of an abnormal and involuntary complication of pregnancy, including but not limited to: puerperal infection, eclampsia, caesarian section delivery, ectopic pregnancy, and toxemia.

"(b) Disability benefits shall be paid upon a doctor's certification that a condition possibly arising out of pregnancy would disable the claimant without regard to the pregnancy, including but not limited to: anemia, diabetes, embolism, heart disease, hypertension, phlebitis, phlebothrombosis, pyelonephritis, thrombophlebitis, vaginitis, varicose veins, and venous thrombosis."

These amendments took effect on January 1, 1974.

payment of any benefits. It is evident that only Jaramillo continues to have a live controversy with the appellant as to the validity of § 2626. The claims of the other appellees have been mooted by the change that *Rentzer* worked in the construction and application of that provision. Thus, the issue before the Court on this appeal is whether the California disability insurance program invidiously discriminates against Jaramillo and others similarly situated by not paying insurance benefits for disability that accompanies normal pregnancy and childbirth.

II

It is clear that California intended to establish this benefit system as an insurance program that was to function essentially in accordance with insurance concepts.[16] Since the program was instituted in 1946, it has been totally self-supporting, never drawing on general state revenues to finance disability or hospital benefits. The Disability Fund is wholly supported by the one percent of wages annually contributed by participating employees. At oral argument, counsel for the appellant informed us that in recent years between 90% and

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[16] In his message to the state legislature proposing the creation of this program, Governor Earl Warren stated:

"It is not possible for employees to obtain from private insurance companies protection against loss of wages or salary during sickness as adequately or cheaply as that protection could be obtained by diverting their present 1 per cent contribution for the support of a Disability Benefits Program." California Senate Journal, Jan. 23, 1946, p. 229.

The California Supreme Court has concluded "that the legislative purpose in providing unemployment disability benefits . . . was to provide an insurance program to pay benefits to individuals who are unemployed because of illness or injury. . . ." *Garcia* v. *Industrial Accident Comm'n*, 41 Cal. 2d 689, 692, 263 P. 2d 8, 10 (1953) (internal quotation marks omitted).

103% of the revenue to the Disability Fund has been paid out in disability and hospital benefits. This history strongly suggests that the one-percent contribution rate, in addition to being easily computable, bears a close and substantial relationship to the level of benefits payable and to the disability risks insured under the program.

Over the years California has demonstrated a strong commitment not to increase the contribution rate above the one-percent level. The State has sought to provide the broadest possible disability protection that would be affordable by all employees, including those with very low incomes. Because any larger percentage or any flat dollar-amount rate of contribution would impose an increasingly regressive levy bearing most heavily upon those with the lowest incomes, the State has resisted any attempt to change the required contribution from the one-percent level. The program is thus structured, in terms of the level of benefits and the risks insured, to maintain the solvency of the Disability Fund at a one-percent annual level of contribution.[17]

In ordering the State to pay benefits for disability accompanying normal pregnancy and delivery, the District Court acknowledged the State's contention "that coverage of these disabilities is so extraordinarily expensive that it would be impossible to maintain a program supported by employee contributions if these disabilities are included." 359 F. Supp., at 798. There is considerable disagreement between the parties with respect to how great the increased costs would actually be, but they

[17] Section 2604 of the Unemployment Insurance Code vests the Governor and the appellant with authority to modify the payment of benefits and to increase the waiting time for eligibility if such steps are necessary to forestall insolvency of the Disability Fund. But neither the Governor nor the appellant is authorized to increase the contribution rate under any circumstances.

would clearly be substantial.[18] For purposes of analysis the District Court accepted the State's estimate, which was in excess of $100 million annually, and stated: "[I]t is clear that including these disabilities would not destroy the program. The increased costs could be accommodated quite easily by making reasonable changes in the contribution rate, the maximum benefits allowable, and the other variables affecting the solvency of the program." *Ibid.*

Each of these "variables"—the benefit level deemed appropriate to compensate employee disability, the risks selected to be insured under the program, and the contribution rate chosen to maintain the solvency of the program and at the same time to permit low-income employees to participate with minimal personal sacrifice—represents a policy determination by the State. The essential issue in this case is whether the Equal Protection Clause requires such policies to be sacrificed or compromised in order to finance the payment of benefits to those whose disability is attributable to normal pregnancy and delivery.

We cannot agree that the exclusion of this disability from coverage amounts to invidious discrimination under the Equal Protection Clause. California does not discriminate with respect to the persons or groups which are eligible for disability insurance protection under the program. The classification challenged in this case relates to the asserted underinclusiveness of the set of risks that the State has selected to insure. Although California has created a program to insure most risks of employment

[18] Appellant's estimate of the increased cost of including normal pregnancy within the insured risks has varied between $120.2 million and $131 million annually, or between a 33% and 36% increase in the present amount of benefits paid under the program. On the other hand, appellee contends that the increased cost would be $48.9 million annually, or a 12% increase over present expenditures.

disability, it has not chosen to insure all such risks, and this decision is reflected in the level of annual contributions exacted from participating employees. This Court has held that, consistently with the Equal Protection Clause, a State "may take one step at a time, addressing itself to the phase of the problem which seems most acute to the legislative mind. . . . The legislature may select one phase of one field and apply a remedy there, neglecting the others. . . ." *Williamson* v. *Lee Optical Co.*, 348 U. S. 483, 489 (1955); *Jefferson* v. *Hackney*, 406 U. S. 535 (1972). Particularly with respect to social welfare programs, so long as the line drawn by the State is rationally supportable, the courts will not interpose their judgment as to the appropriate stopping point. "[T]he Equal Protection Clause does not require that a State must choose between attacking every aspect of a problem or not attacking the problem at all." *Dandridge* v. *Williams*, 397 U. S. 471, 486–487 (1970).

The District Court suggested that moderate alterations in what it regarded as "variables" of the disability insurance program could be made to accommodate the substantial expense required to include normal pregnancy within the program's protection. The same can be said, however, with respect to the other expensive class of disabilities that are excluded from coverage—short-term disabilities. If the Equal Protection Clause were thought to compel disability payments for normal pregnancy, it is hard to perceive why it would not also compel payments for short-term disabilities suffered by participating employees.[19]

It is evident that a totally comprehensive program would be substantially more costly than the present program and would inevitably require state subsidy, a higher

[19] The same could be said of disabilities continuing beyond 26 weeks.

rate of employee contribution, a lower scale of benefits for those suffering insured disabilities, or some combination of these measures. There is nothing in the Constitution, however, that requires the State to subordinate or compromise its legitimate interests solely to create a more comprehensive social insurance program than it already has.

The State has a legitimate interest in maintaining the self-supporting nature of its insurance program. Similarly, it has an interest in distributing the available resources in such a way as to keep benefit payments at an adequate level for disabilities that are covered, rather than to cover all disabilities inadequately. Finally, California has a legitimate concern in maintaining the contribution rate at a level that will not unduly burden participating employees, particularly low-income employees who may be most in need of the disability insurance.

These policies provide an objective and wholly noninvidious basis for the State's decision not to create a more comprehensive insurance program than it has. There is no evidence in the record that the selection of the risks insured by the program worked to discriminate against any definable group or class in terms of the aggregate risk protection derived by that group or class from the program.[20] There is no risk from which men are pro-

[20] The dissenting opinion to the contrary, this case is thus a far cry from cases like *Reed* v. *Reed*, 404 U. S. 71 (1971), and *Frontiero* v. *Richardson*, 411 U. S. 677 (1973), involving discrimination based upon gender as such. The California insurance program does not exclude anyone from benefit eligibility because of gender but merely removes one physical condition—pregnancy—from the list of compensable disabilities. While it is true that only women can become pregnant, it does not follow that every legislative classification concerning pregnancy is a sex-based classification like those considered in *Reed*, *supra*, and *Frontiero*, *supra*. Normal pregnancy is an objectively identifiable physical condition with unique characteristics. Absent a showing that distinctions involving pregnancy are mere pretexts de-

tected and women are not. Likewise, there is no risk from which women are protected and men are not.[21]

The appellee simply contends that, although she has received insurance protection equivalent to that provided all other participating employees, she has suffered discrimination because she encountered a risk that was outside the program's protection. For the reasons we have stated, we hold that this contention is not a valid one under the Equal Protection Clause of the Fourteenth Amendment.

The stay heretofore issued by the Court is vacated, and the judgment of the District Court is

Reversed.

MR. JUSTICE BRENNAN, with whom MR. JUSTICE DOUGLAS and MR. JUSTICE MARSHALL join, dissenting.

Relying upon *Dandridge* v. *Williams*, 397 U. S. 471 (1970), and *Jefferson* v. *Hackney*, 406 U. S. 535 (1972),

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signed to effect an invidious discrimination against the members of one sex or the other, lawmakers are constitutionally free to include or exclude pregnancy from the coverage of legislation such as this on any reasonable basis, just as with respect to any other physical condition.

The lack of identity between the excluded disability and gender as such under this insurance program becomes clear upon the most cursory analysis. The program divides potential recipients into two groups—pregnant women and nonpregnant persons. While the first group is exclusively female, the second includes members of both sexes. The fiscal and actuarial benefits of the program thus accrue to members of both sexes.

[21] Indeed, the appellant submitted to the District Court data that indicated that both the annual claim rate and the annual claim cost are greater for women than for men. As the District Court acknowledged, "women contribute about 28 percent of the total disability insurance fund and receive back about 38 percent of the fund in benefits." 359 F. Supp. 792, 800. Several *amici curiae* have represented to the Court that they have had a similar experience under private disability insurance programs.

the Court today rejects appellees' equal protection claim and upholds the exclusion of normal-pregnancy-related disabilities from coverage under California's disability insurance program on the ground that the legislative classification rationally promotes the State's legitimate cost-saving interests in "maintaining the self-supporting nature of its insurance program[,] . . . distributing the available resources in such a way as to keep benefit payments at an adequate level for disabilities that are covered, . . . [and] maintaining the contribution rate at a level that will not unduly burden participating employees . . . ." *Ante*, at 496. Because I believe that *Reed* v. *Reed*, 404 U. S. 71 (1971), and *Frontiero* v. *Richardson*, 411 U. S. 677 (1973), mandate a stricter standard of scrutiny which the State's classification fails to satisfy, I respectfully dissent.

California's disability insurance program was enacted to supplement the State's unemployment insurance and workmen's compensation programs by providing benefits to wage earners to cushion the economic effects of income loss and medical expenses resulting from sickness or injury. The legislature's intent in enacting the program was expressed clearly in § 2601 of the Unemployment Insurance Code:

> "The purpose of this part is to compensate in part for the wage loss sustained by individuals unemployed because of sickness or injury and to reduce to a minimum the suffering caused by unemployment resulting therefrom. This part shall be construed liberally in aid of its declared purpose to mitigate the evils and burdens which fall on the unemployed and disabled worker and his family."

To achieve the Act's broad humanitarian goals, the legislature fashioned a pooled-risk disability fund cov-

ering all employees at the same rate of contribution,[1] regardless of individual risk.[2] The only requirement that must be satisfied before an employee becomes eligible to receive disability benefits is that the employee must have contributed one percent of a minimum income of $300 during a one-year base period. Cal. Unemp. Ins. Code § 2652. The "basic benefits," varying from $25 to $119 per week, depending upon the employee's base-period earnings, begin on the eighth day of disability or on the first day of hospitalization. §§ 2655, 2627 (b), 2802. Benefits are payable for a maximum of 26 weeks, but may not exceed one-half of the employee's total base-period earnings. § 2653. Finally, compensation is paid for virtually all disabling conditions without regard to cost, voluntariness, uniqueness, predictability, or "normalcy" of the disability.[3] Thus, for example, workers are compensated for costly disabilities such as heart attacks, voluntary disabilities such as cosmetic sur-

[1] An employee must contribute one percent of his annual wages, not exceeding a total contribution of $85 per year ($90 for calendar year 1974 and thereafter). Cal. Unemp. Ins. Code §§ 984, 985, 2901. The ceiling on wages subject to the one-percent contribution rate, of course, introduces a regressive element in the contribution scheme. Perhaps in recognition of this fact, the disability benefits schedule is designed to grant proportionately greater benefits to more poorly paid workers. § 2655.

[2] California deliberately decided not to classify employees on the basis of actuarial data. Thus, the contribution rate for a particular group of employees is not tied to that group's predicted rate of disability claims. 359 F. Supp. 792, 800.

[3] While the Code technically excludes from coverage individuals under court commitment for dipsomania, drug addiction, or sexual psychopathy, Cal. Unemp. Ins. Code § 2678, the Court was informed by the Deputy Attorney General of California at oral argument that court commitment for such disabilities is "a fairly archaic practice" and that "it would be unrealistic to say that they constitute valid exclusions." Tr. of Oral Arg. 13.

gery or sterilization, disabilities unique to sex or race such as prostatectomies or sickle-cell anemia, pre-existing conditions inevitably resulting in disability such as degenerative arthritis or cataracts, and "normal" disabilities such as removal of irritating wisdom teeth or other orthodontia.

Despite the Code's broad goals and scope of coverage, compensation is denied for disabilities suffered in connection with a "normal" pregnancy—disabilities suffered only by women. Cal. Unemp. Ins. Code §§ 2626, 2626.2 (Supp. 1974). Disabilities caused by pregnancy, however, like other physically disabling conditions covered by the Code, require medical care, often include hospitalization, anesthesia and surgical procedures, and may involve genuine risk to life.[4] Moreover, the economic effects

[4] On March 2, 1974, the American College of Obstetricians and Gynecologists adopted the following Policy Statement on Pregnancy-related Disabilities:

"Pregnancy is a physiological process. All pregnant patients, however, have a variable degree of disability on an individual basis, as indicated below, during which time they are unable to perform their usual activities. (1) In an uncomplicated pregnancy, disability occurs near the termination of pregnancy, during labor, delivery, and the puerperium. The process of labor and puerperium is disabling in itself. The usual duration of such disability is approximately six to eight weeks. (2) Complications of a pregnancy may occur which give rise to other disability. Examples of such complications include toxemia, infection, hemorrhage, ectopic pregnancy, and abortion. (3) A woman with pre-existing disease which in itself is not disabling, may become disabled with the addition of pregnancy. Certain patients with heart disease, diabetes, hypertensive cardiovascular disease, renal disease, and other systemic conditions may become disabled during their pregnancy because of the adverse effect pregnancy has upon these conditions.

"The onset, termination and cause of the disability, related to pregnancy, can only be determined by a physician." Brief for Appellees 59–60.

caused by pregnancy-related disabilities are functionally indistinguishable from the effects caused by any other disability: wages are lost due to a physical inability to work, and medical expenses are incurred for the delivery of the child and for postpartum care.[5] In my view, by singling out for less favorable treatment a gender-linked disability peculiar to women, the State has created a double standard for disability compensation: a limitation is imposed upon the disabilities for which women workers may recover, while men receive full compensation for all disabilities suffered, including those that affect only or primarily their sex, such as prostatectomies, circumcision, hemophilia, and gout. In effect, one set of rules is applied to females and another to males. Such dissimilar treatment of men and women, on the basis of physical characteristics inextricably linked to one sex, inevitably constitutes sex discrimination.

The same conclusion has been reached by the Equal Employment Opportunity Commission, the federal agency charged with enforcement of Title VII of the Civil Rights Act of 1964, as amended by the Equal Employment Opportunity Act of 1972, 42 U. S. C. § 2000e *et seq.* (1970 ed., Supp. II), which prohibits employment discrimination on the basis of sex. In guidelines issued pursuant to Title VII and designed to prohibit the dis-

[5] Nearly two-thirds of all women who work do so of necessity: either they are unmarried or their husbands earn less than $7,000 per year. See United States Department of Labor, Women's Bureau, Why Women Work (rev. ed. 1972); United States Department of Labor, Employment Standards Administration, The Myth and the Reality (May 1974 rev.). Moreover, this Court recognized in *Kahn* v. *Shevin*, 416 U. S. 351, 353 (1974), that "data compiled by the Women's Bureau of the United States Department of Labor show that in 1972 a woman working full time had a median income which was only 57.9% of the median for males—a figure actually six points lower than had been achieved in 1955." (Footnote omitted.)

parate treatment of pregnancy disabilities in the employment context,[6] the EEOC has declared:

> "Disabilities caused or contributed to by pregnancy, miscarriage, abortion, childbirth, and recovery therefrom are, for all job-related purposes, temporary disabilities and should be treated as such under any health or temporary disability insurance or sick leave plan available in connection with employment. Written and unwritten employment policies and practices involving matters such as the commencement and duration of leave, the availability of extensions, the accrual of seniority and other benefits and privileges, reinstatement, and payment under any health or temporary disability insurance or sick leave plan, formal or informal, shall be applied to disability due to pregnancy or childbirth on the same terms and conditions as they are applied to other temporary disabilities." 29 CFR § 1604.10 (b).[7]

In the past, when a legislative classification has turned on gender, the Court has justifiably applied a standard of judicial scrutiny more strict than that generally accorded economic or social welfare programs. Compare

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[6] "The Commission carefully scrutinized both employer practices and their crucial impact on women for a substantial period of time and then issued its Guidelines after it became increasingly apparent that systematic and pervasive discrimination against women was frequently found in employers' denial of employment opportunity and benefits to women on the basis of the childbearing role, performed solely by women." Brief for United States Equal Employment Opportunity Commission as *Amicus Curiae* 10.

[7] See also the proposed Sex Discrimination Guidelines issued by the Department of Labor pursuant to Exec. Order 11246, virtually adopting the EEOC's pregnancy-related disabilities guideline, 38 Fed. Reg. 35337, 35338 (Dec. 27, 1973) (proposed 41 CFR § 60–20.3 (h)(2)).

Reed v. *Reed*, 404 U. S. 71 (1971), and *Frontiero* v. *Richardson*, 411 U. S. 677 (1973), with *Dandridge* v. *Williams*, 397 U. S. 471 (1970), and *Jefferson* v. *Hackney*, 406 U. S. 535 (1972). Yet, by its decision today, the Court appears willing to abandon that higher standard of review without satisfactorily explaining what differentiates the gender-based classification employed in this case from those found unconstitutional in *Reed* and *Frontiero*. The Court's decision threatens to return men and women to a time when "traditional" equal protection analysis sustained legislative classifications that treated differently members of a particular sex solely because of their sex. See, *e. g.*, *Muller* v. *Oregon*, 208 U. S. 412 (1908); *Goesaert* v. *Cleary*, 335 U. S. 464 (1948); *Hoyt* v. *Florida*, 368 U. S. 57 (1961).

I cannot join the Court's apparent retreat. I continue to adhere to my view that "classifications based upon sex, like classifications based upon race, alienage, or national origin, are inherently suspect, and must therefore be subjected to strict judicial scrutiny." *Frontiero* v. *Richardson*, *supra*, at 688. When, as in this case, the State employs a legislative classification that distinguishes between beneficiaries solely by reference to gender-linked disability risks, "[t]he Court is not . . . free to sustain the statute on the ground that it rationally promotes legitimate governmental interests; rather, such suspect classifications can be sustained only when the State bears the burden of demonstrating that the challenged legislation serves overriding or compelling interests that cannot be achieved either by a more carefully tailored legislative classification or by the use of feasible, less drastic means." *Kahn* v. *Shevin*, 416 U. S. 351, 357–358 (1974) (BRENNAN, J., dissenting).

The State has clearly failed to meet that burden in the present case. The essence of the State's justification for

excluding disabilities caused by a normal pregnancy from its disability compensation scheme is that covering such disabilities would be too costly. To be sure, as presently funded, inclusion of normal pregnancies "would be substantially more costly than the present program." [8] *Ante*, at 495. The present level of benefits for insured disabilities could not be maintained without increasing the employee contribution rate, raising or lifting the yearly contribution ceiling, or securing state subsidies. But whatever role such monetary considerations may play in traditional equal protection analysis, the State's interest in preserving the fiscal integrity of its disability insurance program simply cannot render the State's use of a suspect classification constitutional. For while "a State has a valid interest in preserving the fiscal integrity of its programs[,] . . . a State may not accomplish such a purpose by invidious distinctions between classes of its citizens. . . . The saving of welfare costs cannot justify an otherwise invidious classification." *Shapiro* v. *Thompson*, 394 U. S. 618, 633 (1969). Thus, when a statutory classification is subject to strict judicial scrutiny, the State "must do more than show that denying [benefits to the excluded class] saves money." *Memorial Hospital* v. *Maricopa County*, 415 U. S. 250, 263 (1974). See also *Graham* v. *Richardson*, 403 U. S. 365, 374–375 (1971).[9]

[8] However, "[i]t is important to remember, especially in the cost context, that if an employee is being paid his regular pay while disabled, he cannot collect disability pay. Therefore, it follows that any alleged financial burden on the State will be greatly diminished when employers adhere to Title VII and treat pregnancy-related disabilities the same as other disabilities by allowing women to use accumulated sick leave and possibly annual leave as well." Brief for United States Equal Employment Opportunity Commission as *Amicus Curiae* 21 n. 12.

[9] Similarly, under the EEOC's Guidelines on Discrimination Because of Sex, "[i]t shall not be a defense under title VIII to a charge

Moreover, California's legitimate interest in fiscal integrity could easily have been achieved through a variety of less drastic, sexually neutral means. As the District Court observed:

> "Even using [the State's] estimate of the cost of expanding the program to include pregnancy-related disabilities, however, it is clear that including these disabilities would not destroy the program. The increased costs could be accommodated quite easily by making reasonable changes in the contribution rate, the maximum benefits allowable, and the other variables affecting the solvency of the program. For example, the entire cost increase estimated by defendant could be met by requiring workers to contribute an additional amount of approximately .364 percent of their salary and increasing the maximum annual contribution to about $119." 359 F. Supp. 792, 798.

I would therefore affirm the judgment of the District Court.

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of sex discrimination in benefits that the cost of such benefits is greater with respect to one sex than the other." 29 CFR § 1604.9 (e).

SCHERK *v.* ALBERTO-CULVER CO.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

No. 73–781. Argued April 29, 1974—Decided June 17, 1974

Respondent, an American manufacturer based in Illinois, in order to expand its overseas operations, purchased from petitioner, a German citizen, three enterprises owned by him and organized under the laws of Germany and Liechtenstein, together with all trademark rights of these enterprises. The sales contract, which was negotiated in the United States, England, and Germany, signed in Austria, and closed in Switzerland, contained express warranties by petitioner that the trademarks were unencumbered and a clause providing that "any controversy or claim [that] shall arise out of this agreement or the breach thereof" would be referred to arbitration before the International Chamber of Commerce in Paris, France, and that Illinois laws would govern the agreement and its interpretation and performance. Subsequently, after allegedly discovering that the trademarks were subject to substantial encumbrances, respondent offered to rescind the contract, but when petitioner refused, respondent brought suit in District Court for damages and other relief, contending that petitioner's fraudulent representations concerning the trademark rights violated § 10 (b) of the Securities Exchange Act of 1934 and Rule 10b–5 promulgated thereunder. Petitioner moved to dismiss the action or alternatively to stay the action pending arbitration, but the District Court denied the motion to dismiss and, as sought by respondent, preliminarily enjoined petitioner from proceeding with arbitration, holding, in reliance on *Wilko* v. *Swan*, 346 U. S. 427, that the arbitration clause was unenforceable. The Court of Appeals affirmed. *Held:* The arbitration clause is to be respected and enforced by federal courts in accord with the explicit provisions of the United States Arbitration Act that an arbitration agreement, such as is here involved, "shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." 9 U. S. C. §§ 1, 2. *Wilko* v. *Swan*, *supra*, distinguished. Pp. 510–520.

(a) Since uncertainty will almost inevitably exist with respect to any contract, such as the one in question here, with substantial

contacts in two or more countries, each with its own substantive laws and conflict-of-laws rules, a contractual provision specifying in advance the forum for litigating disputes and the law to be applied is an almost indispensable precondition to achieving the orderliness and predictability essential to any international business transaction. Such a provision obviates the danger that a contract dispute might be submitted to a forum hostile to the interests of one of the parties or unfamiliar with the problem area involved. Pp. 515–517.

(b) In the context of an international contract, the advantages that a security buyer might possess in having a wide choice of American courts and venue in which to litigate his claims of violations of the securities laws, become chimerical, since an opposing party may by speedy resort to a foreign court block or hinder access to the American court of the buyer's choice. Pp. 517–518.

(c) An agreement to arbitrate before a specified tribunal is, in effect, a specialized kind of forum-selection clause that posits not only the situs of suit but also the procedure to be used in resolving the dispute, and the invalidation of the arbitration clause in this case would not only allow respondent to repudiate its solemn promise but would, as well, reflect a "parochial concept that all disputes must be resolved under our laws and in our courts." *The Bremen* v. *Zapata Off-Shore Co.*, 407 U. S. 1, 9. P. 519.

484 F. 2d 611, reversed and remanded.

STEWART, J., delivered the opinion of the Court, in which BURGER, C. J., and BLACKMUN, POWELL, and REHNQUIST, JJ., joined. DOUGLAS, J., filed a dissenting opinion, in which BRENNAN, WHITE, and MARSHALL, JJ., joined, *post*, p. 521.

Robert F. Hanley argued the cause for petitioner. With him on the briefs was *Lynne E. McNown.*

Francis J. Higgins argued the cause for respondent. With him on the brief was *A. Charles Lawrence.*

Gerald Aksen argued the cause for the American Arbitration Assn. as *amicus curiae* urging reversal. With him on the brief were *Whitney North Seymour, Sol Neil Corbin, Rita E. Hauser, Howard M. Holtzmann, Andreas F. Lowenfeld, John R. Stevenson,* and *Rosemary S. Page.*

MR. JUSTICE STEWART delivered the opinion of the Court.

Alberto-Culver Co., the respondent, is an American company incorporated in Delaware with its principal office in Illinois. It manufactures and distributes toiletries and hair products in this country and abroad. During the 1960's Alberto-Culver decided to expand its overseas operations, and as part of this program it approached the petitioner Fritz Scherk, a German citizen residing at the time of trial in Switzerland. Scherk was the owner of three interrelated business entities, organized under the laws of Germany and Liechtenstein, that were engaged in the manufacture of toiletries and the licensing of trademarks for such toiletries. An initial contact with Scherk was made by a representative of Alberto-Culver in Germany in June 1967, and negotiations followed at further meetings in both Europe and the United States during 1967 and 1968. In February 1969 a contract was signed in Vienna, Austria, which provided for the transfer of the ownership of Scherk's enterprises to Alberto-Culver, along with all rights held by these enterprises to trademarks in cosmetic goods. The contract contained a number of express warranties whereby Scherk guaranteed the sole and unencumbered ownership of these trademarks. In addition, the contract contained an arbitration clause providing that "any controversy or claim [that] shall arise out of this agreement or the breach thereof" would be referred to arbitration before the International Chamber of Commerce in Paris, France, and that "[t]he laws of the State of Illinois, U. S. A. shall apply to and govern this agreement, its interpretation and performance." [1]

[1] The arbitration clause relating to the transfer of one of Scherk's business entities, similar to the clauses covering the other two, reads in its entirety as follows:

"The parties agree that if any controversy or claim shall arise out

The closing of the transaction took place in Geneva, Switzerland, in June 1969. Nearly one year later Alberto-Culver allegedly discovered that the trademark rights purchased under the contract were subject to substantial encumbrances that threatened to give others superior rights to the trademarks and to restrict or preclude Alberto-Culver's use of them. Alberto-Culver thereupon tendered back to Scherk the property that had been transferred to it and offered to rescind the contract. Upon Scherk's refusal, Alberto-Culver commenced this action for damages and other relief in a Federal District Court in Illinois, contending that Scherk's fraudulent representations concerning the status of the trademark rights constituted violations of § 10 (b) of the Securities Exchange Act of 1934, 48 Stat. 891, 15 U. S. C. § 78j (b), and Rule 10b–5 promulgated thereunder, 17 CFR § 240.-10b–5.

In response, Scherk filed a motion to dismiss the action for want of personal and subject-matter jurisdiction as well as on the basis of *forum non conveniens,* or, alternatively, to stay the action pending arbitration in Paris pursuant to the agreement of the parties. Alberto-

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of this agreement or the breach thereof and either party shall request that the matter shall be settled by arbitration, the matter shall be settled exclusively by arbitration in accordance with the rules then obtaining of the International Chamber of Commerce, Paris, France, by a single arbitrator, if the parties shall agree upon one, or by one arbitrator appointed by each party and a third arbitrator appointed by the other arbitrators. In case of any failure of a party to make an appointment referred to above within four weeks after notice of the controversy, such appointment shall be made by said Chamber. All arbitration proceedings shall be held in Paris, France, and each party agrees to comply in all respects with any award made in any such proceeding and to the entry of a judgment in any jurisdiction upon any award rendered in such proceeding. The laws of the State of Illinois, U. S. A. shall apply to and govern this agreement, its interpretation and performance."

Culver, in turn, opposed this motion and sought a preliminary injunction restraining the prosecution of arbitration proceedings.[2] On December 2, 1971, the District Court denied Scherk's motion to dismiss, and, on January 14, 1972, it granted a preliminary order enjoining Scherk from proceeding with arbitration. In taking these actions the court relied entirely on this Court's decision in *Wilko* v. *Swan*, 346 U. S. 427, which held that an agreement to arbitrate could not preclude a buyer of a security from seeking a judicial remedy under the Securities Act of 1933, in view of the language of § 14 of that Act, barring "[a]ny condition, stipulation, or provision binding any person acquiring any security to waive compliance with any provision of this subchapter . . . ." 48 Stat. 84, 15 U. S. C. § 77n.[3] The Court of Appeals for the Seventh Circuit, with one judge dissenting, affirmed, upon what it considered the controlling authority of the *Wilko* decision. 484 F. 2d 611. Because of the importance of the question presented we granted Scherk's petition for a writ of certiorari. 414 U. S. 1156.

I

The United States Arbitration Act, now 9 U. S. C. § 1 *et seq.*, reversing centuries of judicial hostility to arbitration agreements,[4] was designed to allow parties to avoid

[2] Scherk had taken steps to initiate arbitration in Paris in early 1971. He did not, however, file a formal request for arbitration with the International Chamber of Commerce until November 9, 1971, almost five months after the filing of Alberto-Culver's complaint in the Illinois federal court.

[3] The memorandum opinion of the District Court is unreported.

[4] English courts traditionally considered irrevocable arbitration agreements as "ousting" the courts of jurisdiction, and refused to enforce such agreements for this reason. This view was adopted by American courts as part of the common law up to the time of the adoption of the Arbitration Act. See H. R. Rep. No. 96, 68th Cong.,

"the costliness and delays of litigation," and to place arbitration agreements "upon the same footing as other contracts . . . ." H. R. Rep. No. 96, 68th Cong., 1st Sess., 1, 2 (1924); see also S. Rep. No. 536, 68th Cong., 1st Sess. (1924). Accordingly, the Act provides that an arbitration agreement such as is here involved "shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." 9 U. S. C. § 2.[5] The Act also provides in § 3 for a stay of proceedings in a case where a court is satisfied that the issue before it is arbitrable under the agreement, and § 4 of the Act directs a federal court to order parties to proceed to arbitration if there has been a "failure, neglect, or refusal" of any party to honor an agreement to arbitrate.

In *Wilko* v. *Swan, supra,* this Court acknowledged that the Act reflects a legislative recognition of the "desirability of arbitration as an alternative to the complications of litigation," 346 U. S., at 431, but nonetheless declined to apply the Act's provisions. That case involved an agreement between Anthony Wilko and Hayden, Stone & Co., a large brokerage firm, under which Wilko agreed to purchase on margin a number of shares of a corporation's common stock. Wilko alleged that his purchase of the stock was induced by false represen-

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1st Sess., 1, 2 (1924); Sturges & Murphy, Some Confusing Matters Relating to Arbitration under the United States Arbitration Act, 17 Law & Contemp. Prob. 580.

[5] Section 2 of the Arbitration Act renders "valid, irrevocable, and enforceable" written arbitration provisions "in any maritime transaction or a contract evidencing a transaction involving commerce . . . ," as those terms are defined in § 1. In *Bernhardt* v. *Polygraphic Co.,* 350 U. S. 198, this Court held that the stay provisions of § 3 apply only to the two kinds of contracts specified in §§ 1 and 2. Since the transaction in this case constituted "commerce . . . with foreign nations," 9 U. S. C. § 1, the Act clearly covers this agreement.

tations on the part of the defendant concerning the value of the shares, and he brought suit for damages under § 12 (2) of the Securities Act of 1933, 15 U. S. C. § 77*l*. The defendant responded that Wilko had agreed to submit all controversies arising out of the purchase to arbitration, and that this agreement, contained in a written margin contract between the parties, should be given full effect under the Arbitration Act.

The Court found that "[t]wo policies, not easily reconcilable, are involved in this case." 346 U. S., at 438. On the one hand, the Arbitration Act stressed "the need for avoiding the delay and expense of litigation," *id.*, at 431, and directed that such agreements be "valid, irrevocable, and enforceable" in federal courts. On the other hand, the Securities Act of 1933 was "[d]esigned to protect investors" and to require "issuers, underwriters, and dealers to make full and fair disclosure of the character of securities sold in interstate and foreign commerce and to prevent fraud in their sale," by creating "a special right to recover for misrepresentation . . . ." 346 U. S., at 431 (footnote omitted). In particular, the Court noted that § 14 of the Securities Act, 15 U. S. C. § 77n, provides:

> "Any condition, stipulation, or provision binding any person acquiring any security to waive compliance with any provision of this subchapter or of the rules and regulations of the Commission shall be void."

The Court ruled that an agreement to arbitrate "is a 'stipulation,' and [that] the right to select the judicial forum is the kind of 'provision' that cannot be waived under § 14 of the Securities Act." [6] 346 U. S., at 434–435.

[6] The arbitration agreement involved in *Wilko* was contained in a standard form margin contract. But see the dissenting opinion of Mr. Justice Frankfurter, 346 U. S. 427, 439, 440, concluding that the record did not show that "the plaintiff [Wilko] in opening an ac-

Thus, Wilko's advance agreement to arbitrate any disputes subsequently arising out of his contract to purchase the securities was unenforceable under the terms of § 14 of the Securities Act of 1933.

Alberto-Culver, relying on this precedent, contends that the District Court and Court of Appeals were correct in holding that its agreement to arbitrate disputes arising under the contract with Scherk is similarly unenforceable in view of its contentions that Scherk's conduct constituted violations of the Securities Exchange Act of 1934 and rules promulgated thereunder. For the reasons that follow, we reject this contention and hold that the provisions of the Arbitration Act cannot be ignored in this case.

At the outset, a colorable argument could be made that even the semantic reasoning of the *Wilko* opinion does not control the case before us. *Wilko* concerned a suit brought under § 12 (2) of the Securities Act of 1933, which provides a defrauded purchaser with the "special right" of a private remedy for civil liability, 346 U. S., at 431. There is no statutory counterpart of § 12 (2) in the Securities Exchange Act of 1934, and neither § 10 (b) of that Act nor Rule 10b–5 speaks of a private remedy to redress violations of the kind alleged here. While federal case law has established that § 10 (b) and Rule 10b–5 create an implied private cause of action, see

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count had no choice but to accept the arbitration stipulation . . . ." The petitioner here would limit the decision in *Wilko* to situations where the parties exhibit a disparity of bargaining power, and contends that, since the negotiations leading to the present contract took place over a number of years and involved the participation on both sides of knowledgeable and sophisticated business and legal experts, the *Wilko* decision should not apply. See also the dissenting opinion of Judge Stevens of the Court of Appeals in this case, 484 F. 2d 611, 615. Because of our disposition of this case on other grounds, we need not consider this contention.

6 L. Loss, Securities Regulation 3869–3873 (1969) and cases cited therein; cf. *J. I. Case Co.* v. *Borak*, 377 U. S. 426, the Act itself does not establish the "special right" that the Court in *Wilko* found significant. Furthermore, while both the Securities Act of 1933 and the Securities Exchange Act of 1934 contain sections barring waiver of compliance with any "provision" of the respective Acts,[7] certain of the "provisions" of the 1933 Act that the Court held could not be waived by Wilko's agreement to arbitrate find no counterpart in the 1934 Act. In particular, the Court in *Wilko* noted that the jurisdictional provision of the 1933 Act, 15 U. S. C. § 77v, allowed a plaintiff to bring suit "in any court of competent jurisdiction—federal or state—and removal from a state court is prohibited." 346 U. S., at 431. The analogous provision of the 1934 Act, by contrast, provides for suit only in the federal district courts that have "exclusive jurisdiction," 15 U. S. C. § 78aa, thus significantly restricting the plaintiff's choice of forum.[8]

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[7] Section 14 of the Securities Act of 1933, 15 U. S. C. § 77n, provides as follows:

"Any condition, stipulation, or provision binding any person acquiring any security to waive compliance with any provision of this subchapter or of the rules and regulations of the Commission shall be void."

Section 29 (a) of the Securities Exchange Act of 1934, 15 U. S. C. § 78cc (a), provides:

"Any condition, stipulation, or provision binding any person to waive compliance with any provision of this chapter or of any rule or regulation thereunder, or of any rule of an exchange required thereby shall be void."

While the two sections are not identical, the variations in their wording seem irrelevant to the issue presented in this case.

[8] We do not reach, or imply any opinion as to, the question whether the acquisition of Scherk's businesses was a security transaction within the meaning of § 10 (b) of the Securities Exchange Act of 1934 and Rule 10b–5. Although this important question

Accepting the premise, however, that the operative portions of the language of the 1933 Act relied upon in *Wilko* are contained in the Securities Exchange Act of 1934, the respondent's reliance on *Wilko* in this case ignores the significant and, we find, crucial differences between the agreement involved in *Wilko* and the one signed by the parties here. Alberto-Culver's contract to purchase the business entities belonging to Scherk was a truly international agreement. Alberto-Culver is an American corporation with its principal place of business and the vast bulk of its activity in this country, while Scherk is a citizen of Germany whose companies were organized under the laws of Germany and Liechtenstein. The negotiations leading to the signing of the contract in Austria and to the closing in Switzerland took place in the United States, England, and Germany, and involved consultations with legal and trademark experts from each of those countries and from Liechtenstein. Finally, and most significantly, the subject matter of the contract concerned the sale of business enterprises organized under the laws of and primarily situated in European countries, whose activities were largely, if not entirely, directed to European markets.

Such a contract involves considerations and policies significantly different from those found controlling in *Wilko*. In *Wilko*, quite apart from the arbitration provision, there was no question but that the laws of the United States generally, and the federal securities laws in particular, would govern disputes arising out of the stock-purchase agreement. The parties, the negotiations, and the subject matter of the contract were all

was considered by the District Court and the Court of Appeals, and although the dissenting opinion, *post*, p. 521, seems to consider it controlling, the petitioner did not assign the adverse ruling on the question as error and it was not briefed or argued in this Court.

situated in this country, and no credible claim could have been entertained that any international conflict-of-laws problems would arise. In this case, by contrast, in the absence of the arbitration provision considerable uncertainty existed at the time of the agreement, and still exists, concerning the law applicable to the resolution of disputes arising out of the contract.[9]

Such uncertainty will almost inevitably exist with respect to any contract touching two or more countries, each with its own substantive laws and conflict-of-laws rules. A contractual provision specifying in advance the forum in which disputes shall be litigated and the law to be applied is, therefore, an almost indispensable precondition to achievement of the orderliness and predictability essential to any international business transaction. Furthermore, such a provision obviates the danger that a dispute under the agreement might be submitted to a forum hostile to the interests of one of the parties or unfamiliar with the problem area involved.[10]

A parochial refusal by the courts of one country to enforce an international arbitration agreement would not only frustrate these purposes, but would invite

[9] Together with his motion for a stay pending arbitration, Scherk moved that the complaint be dismissed because the federal securities laws do not apply to this international transaction, cf. *Leasco Data Processing Equipment Corp.* v. *Maxwell*, 468 F. 2d 1326 (CA2 1972). Since only the order granting the injunction was appealed, this contention was not considered by the Court of Appeals and is not before this Court.

[10] See Quigley, Accession by the United States to the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 70 Yale L. J. 1049, 1051 (1961). For example, while the arbitration agreement involved here provided that the controversies arising out of the agreement be resolved under "[t]he laws of the State of Illinois," *supra*, n. 1, a determination of the existence and extent of fraud concerning the trademarks would necessarily involve an understanding of foreign law on that subject.

unseemly and mutually destructive jockeying by the parties to secure tactical litigation advantages. In the present case, for example, it is not inconceivable that if Scherk had anticipated that Alberto-Culver would be able in this country to enjoin resort to arbitration he might have sought an order in France or some other country enjoining Alberto-Culver from proceeding with its litigation in the United States. Whatever recognition the courts of this country might ultimately have granted to the order of the foreign court, the dicey atmosphere of such a legal no-man's-land would surely damage the fabric of international commerce and trade, and imperil the willingness and ability of businessmen to enter into international commercial agreements.[11]

The exception to the clear provisions of the Arbitration Act carved out by *Wilko* is simply inapposite to a case such as the one before us. In *Wilko* the Court reasoned

[11] The dissenting opinion argues that our conclusion that *Wilko* is inapplicable to the situation presented in this case will vitiate the force of that decision because parties to transactions with many more direct contacts with this country than in the present case will nonetheless be able to invoke the "talisman" of having an "international contract." *Post*, at 529. Concededly, situations may arise where the contacts with foreign countries are so insignificant or attenuated that the holding in *Wilko* would meaningfully apply. Judicial response to such situations can and should await future litigation in concrete cases. This case, however, provides no basis for a judgment that only United States laws and United States courts should determine this controversy in the face of a solemn agreement between the parties that such controversies be resolved elsewhere. The only contact between the United States and the transaction involved here is the fact that Alberto-Culver is an American corporation and the occurrence of some—but by no means the greater part—of the pre-contract negotiations in this country. To determine that "American standards of fairness," *post*, at 528, must nonetheless govern the controversy demeans the standards of justice elsewhere in the world, and unnecessarily exalts the primacy of United States law over the laws of other countries.

that "[w]hen the security buyer, prior to any violation of the Securities Act, waives his right to sue in courts, he gives up more than would a participant in other business transactions. The security buyer has a wider choice of courts and venue. He thus surrenders one of the advantages the Act gives him . . . ." 346 U. S., at 435. In the context of an international contract, however, these advantages become chimerical since, as indicated above, an opposing party may by speedy resort to a foreign court block or hinder access to the American court of the purchaser's choice.[12]

Two Terms ago in *The Bremen* v. *Zapata Off-Shore Co.*, 407 U. S. 1, we rejected the doctrine that a forum-selection clause of a contract, although voluntarily adopted by the parties, will not be respected in a suit brought in the United States " 'unless the selected state would provide a more convenient forum than the state in which suit is brought.' " *Id.*, at 7. Rather, we concluded that a "forum clause should control absent a strong showing that it should be set aside." *Id.*, at 15. We noted that "much uncertainty and possibly great inconvenience to both parties could arise if a suit could be maintained in any jurisdiction in which an accident might occur or if jurisdiction were left to any place [where personal or *in rem* jurisdiction might be established]. The elimination of all such uncertainties by agreeing in advance on a forum acceptable to both parties is an indispensable element in international trade, commerce, and contracting." *Id.*, at 13–14.

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[12] The dissenting opinion raises the specter that our holding today will leave American investors at the mercy of multinational corporations with "vast operations around the world . . . ." *Post*, at 533. Our decision, of course, has no bearing on the scope of the substantive provisions of the federal securities laws for the simple reason that the question is not presented in this case. See n. 8, *supra*.

An agreement to arbitrate before a specified tribunal is, in effect, a specialized kind of forum-selection clause that posits not only the situs of suit but also the procedure to be used in resolving the dispute.[13] The invalidation of such an agreement in the case before us would not only allow the respondent to repudiate its solemn promise but would, as well, reflect a "parochial concept that all disputes must be resolved under our laws and in our courts. . . . We cannot have trade and commerce in world markets and international waters exclusively on our terms, governed by our laws, and resolved in our courts." *Id.*, at 9.[14]

For all these reasons we hold that the agreement of the parties in this case to arbitrate any dispute arising out of their international commercial transaction is to be

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[13] Under some circumstances, the designation of arbitration in a certain place might also be viewed as implicitly selecting the law of that place to apply to that transaction. In this case, however, "[t]he laws of the State of Illinois" were explicitly made applicable by the arbitration agreement. See n. 1, *supra*.

[14] In *The Bremen* we noted that forum-selection clauses "should be given full effect" when "a freely negotiated private international agreement [is] unaffected by fraud . . . ." 407 U. S., at 13, 12. This qualification does not mean that any time a dispute arising out of a transaction is based upon an allegation of fraud, as in this case, the clause is unenforceable. Rather, it means that an arbitration or forum-selection clause in a contract is not enforceable if the *inclusion of that clause in the contract* was the product of fraud or coercion. Cf. *Prima Paint Corp.* v. *Flood & Conklin Mfg. Co.*, 388 U. S. 395.

Although we do not decide the question, presumably the type of fraud alleged here could be raised, under Art. V of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, see n. 15, *infra*, in challenging the enforcement of whatever arbitral award is produced through arbitration. Article V (2)(*b*) of the Convention provides that a country may refuse recognition and enforcement of an award if "recognition or enforcement of the award would be contrary to the public policy of that country."

respected and enforced by the federal courts in accord with the explicit provisions of the Arbitration Act.[15]

Accordingly, the judgment of the Court of Appeals is

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[15] Our conclusion today is confirmed by international developments and domestic legislation in the area of commercial arbitration subsequent to the *Wilko* decision. On June 10, 1958, a special conference of the United Nations Economic and Social Council adopted the Convention on the Recognition and Enforcement of Foreign Arbitral Awards. In 1970 the United States acceded to the treaty, [1970] 3 U. S. T. 2517, T. I. A. S. No. 6997, and Congress passed Chapter 2 of the United States Arbitration Act, 9 U. S. C. § 201 *et seq.*, in order to implement the Convention. Section 1 of the new chapter, 9 U. S. C. § 201, provides unequivocally that the Convention "shall be enforced in United States courts in accordance with this chapter."

The goal of the Convention, and the principal purpose underlying American adoption and implementation of it, was to encourage the recognition and enforcement of commercial arbitration agreements in international contracts and to unify the standards by which agreements to arbitrate are observed and arbitral awards are enforced in the signatory countries. See Convention on the Recognition and Enforcement of Foreign Arbitral Awards, S. Exec. Doc. E, 90th Cong., 2d Sess. (1968); Quigley, Accession by the United States to the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 70 Yale L. J. 1049 (1961). Article II (1) of the Convention provides:

"Each Contracting State shall recognize an agreement in writing under which the parties undertake to submit to arbitration all or any differences which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not, concerning a subject matter capable of settlement by arbitration."

In their discussion of this Article, the delegates to the Convention voiced frequent concern that courts of signatory countries in which an agreement to arbitrate is sought to be enforced should not be permitted to decline enforcement of such agreements on the basis of parochial views of their desirability or in a manner that would diminish the mutually binding nature of the agreements. See G. Haight, Convention on the Recognition and Enforcement of For-

reversed and the case is remanded to that court with directions to remand to the District Court for further proceedings consistent with this opinion.

It is so ordered.

MR. JUSTICE DOUGLAS, with whom MR. JUSTICE BRENNAN, MR. JUSTICE WHITE, and MR. JUSTICE MARSHALL concur, dissenting.

Respondent (Alberto-Culver) is a publicly held corporation whose stock is traded on the New York Stock Exchange and is a Delaware corporation with its principal place of business in Illinois. Petitioner (Scherk) owned a business in Germany, Firma Ludwig Scherk, dealing with cosmetics and toiletries. Scherk owned various trademarks and all outstanding securities of a Liechtenstein corporation (SEV) and of a German corporation, Lodeva. Scherk also owned various trademarks which were licensed to manufacturers and distributors in Europe and in this country. SEV collected the royalties on those licenses.

Alberto-Culver undertook to purchase from Scherk the entire establishment—the trademarks and the stock of the two corporations; and later, alleging it had been defrauded, brought this suit in the United States District Court in Illinois to rescind the agreement and to obtain damages.

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eign Arbitral Awards: Summary Analysis of Record of United Nations Conference, May/June 1958, pp. 24–28 (1958).

Without reaching the issue of whether the Convention, apart from the considerations expressed in this opinion, would require of its own force that the agreement to arbitrate be enforced in the present case, we think that this country's adoption and ratification of the Convention and the passage of Chapter 2 of the United States Arbitration Act provide strongly persuasive evidence of congressional policy consistent with the decision we reach today.

The only defense material at this stage of the proceeding is a provision of the contract providing that if any controversy or claim arises under the agreement the parties agree it will be settled "exclusively" by arbitration under the rules of the International Chamber of Commerce, Paris, France.

The basic dispute between the parties concerned allegations that the trademarks which were basic assets in the transaction were encumbered and that their purchase was induced through serious instances of fraudulent representations and omissions by Scherk and his agents within the jurisdiction of the United States. If a question of trademarks were the only one involved, the principle of *The Bremen* v. *Zapata Off-Shore Co.*, 407 U. S. 1, would be controlling.

We have here, however, questions under the Securities Exchange Act of 1934, which in § 3 (a)(10) defines "security" as including any "note, stock, treasury stock, bond, debenture, certificate of interest or participation in any profit-sharing agreement . . . ." 15 U. S. C. § 78c (a)(10). We held in *Tcherepnin* v. *Knight*, 389 U. S. 332, as respects § 3 (a)(10):

> "[R]emedial legislation should be construed broadly to effectuate its purposes. The Securities Exchange Act quite clearly falls into the category of remedial legislation. One of its central purposes is to protect investors through the requirement of full disclosure by issuers of securities, and the definition of security in § 3 (a)(10) necessarily determines the classes of investments and investors which will receive the Act's protections. Finally, we are reminded that, in searching for the meaning and scope of the word 'security' in the Act, form should be disregarded for substance and the emphasis should

be on economic reality." *Id.*, at 336. (Footnote omitted.)

Section 10 (b) of the 1934 Act makes it unlawful for any person by use of agencies of interstate commerce or the mails "[t]o use or employ, in connection with the purchase or sale of any security," whether or not registered on a national securities exchange, "any manipulative or deceptive device or contrivance in contravention of such rules and regulations as the Commission may prescribe." 15 U. S. C. § 78j (b).

Alberto-Culver, as noted, is not a private person but a corporation with publicly held stock listed on the New York Stock Exchange. If it is to be believed, if in other words the allegations made are proved, the American company has been defrauded by the issuance of "securities" (promissory notes) for assets which are worthless or of a much lower value than represented. Rule 10b–5 of the Securities and Exchange Commission states:

> "It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce, or of the mails or of any facility of any national securities exchange,
>
> "(a) To employ any device, scheme, or artifice to defraud,
>
> "(b) To make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading, or
>
> "(c) To engage in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person,
>
> "in connection with the purchase or sale of any security." 17 CFR § 240.10b–5.

Section 29 (a) of the Act provides:

> "Any condition, stipulation, or provision binding any person to waive compliance with any provision of this chapter or of any rule or regulation thereunder, or of any rule of an exchange required thereby shall be void." 15 U. S. C. § 78cc (a).

And § 29 (b) adds that "[e]very contract" made in violation of the Act "shall be void." [1] No exception is made for contracts which have an international character.

The Securities Act of 1933, 48 Stat. 84, 15 U. S .C. § 77n, has a like provision in its § 14:

> "Any condition, stipulation, or provision binding any person acquiring any security to waive compliance with any provision of this subchapter or of the rules and regulations of the Commission shall be void."

In *Wilko* v. *Swan*, 346 U. S. 427, a customer brought suit against a brokerage house alleging fraud in the sale of stock. A motion was made to stay the trial until arbitration occurred under the United States Arbitration Act, 9 U. S. C. § 3, as provided in the customer's contract. The

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[1] Section 29 (b) reads: "Every contract made in violation of any provision of this chapter or of any rule or regulation thereunder, and every contract (including any contract for listing a security on an exchange) heretofore or hereafter made, the performance of which involves the violation of, or the continuance of any relationship or practice in violation of, any provision of this chapter or any rule or regulation thereunder, shall be void (1) as regards the rights of any person who, in violation of any such provision, rule, or regulation, shall have made or engaged in the performance of any such contract, and (2) as regards the rights of any person who, not being a party to such contract, shall have acquired any right thereunder with actual knowledge of the facts by reason of which the making or performance of such contract was in violation of any such provision, rule, or regulation . . . ." 15 U. S. C. § 78cc (b).

Court held that an agreement for arbitration was a "stipulation" within the meaning of § 14 which sought to "waive" compliance with the Securities Act. We accordingly held that the courts, not the arbitration tribunals, had jurisdiction over suits under that Act. The arbitration agency, we held, was bound by other standards which were not necessarily consistent with the 1933 Act. We said:

> "As the protective provisions of the Securities Act require the exercise of judicial direction to fairly assure their effectiveness, it seems to us that Congress must have intended § 14 . . . to apply to waiver of judicial trial and review." 346 U. S., at 437.

Wilko was held by the Court of Appeals to control this case—and properly so.

The Court does not consider the question whether a "security" is involved in this case, saying it was not raised by petitioner. A respondent, however, has the right to urge any argument to support the judgment in his favor (save possibly questions of venue, see *Peoria R. Co.* v. *United States,* 263 U. S. 528, 536; *United States* v. *American Railway Express Co.,* 265 U. S. 425, 435–436, and n. 11), even those not passed upon by the court below and also contentions rejected below. *Langnes* v. *Green,* 282 U. S. 531, 535–539; *Walling* v. *General Industries Co.,* 330 U. S. 545, 547 n. 5. The Court of Appeals held that "securities" within the meaning of the 1934 Act were involved here, 484 F. 2d 611, 615. The brief of the respondent is based on the premise that "securities" are involved here; and petitioner has not questioned that ruling of the Court of Appeals.

It could perhaps be argued that *Wilko* does not govern because it involved a little customer pitted against a big brokerage house, while we deal here with sophisticated buyers and sellers: Scherk, a powerful German operator,

and Alberto-Culver, an American business surrounded and protected by lawyers and experts. But that would miss the point of the problem. The Act does not speak in terms of "sophisticated" as opposed to "unsophisticated" people dealing in securities. The rules when the giants play are the same as when the pygmies enter the market.

If there are victims here, they are not Alberto-Culver the corporation, but the thousands of investors who are the security holders in Alberto-Culver. If there is fraud and the promissory notes are excessive, the impact is on the equity in Alberto-Culver.

Moreover, the securities market these days is not made up of a host of small people scrambling to get in and out of stocks or other securities. The markets are overshadowed by huge institutional traders.[2] The so-called "off-shore funds," of which Scherk is a member, present perplexing problems under both the 1933 and 1934 Acts.[3] The tendency of American investors to invest indirectly as through mutual funds[4] may change the character of the regulation but not its need.

There has been much support for arbitration of disputes; and it may be the superior way of settling some disagreements. If A and B were quarreling over a trademark and there was an arbitration clause in the contract, the policy of Congress in implementing the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards, as it did in 9 U. S. C. § 201 *et seq.*, would prevail. But the Act does not substitute an arbiter for the settlement of disputes under

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[2] See Institutional Investor Study Report of the SEC, H. R. Doc. No. 92–64 (1971), particularly Vol. 4.

[3] *Id.*, Vol. 1, p. XVI; Vol. 3, p. 879 *et seq.*

[4] *Id.*, Vol. 1, p. XIX; Vol. 2, p. 215 *et seq.*

the 1933 and 1934 Acts. Art. II (3) of the Convention says:

> "The court of a Contracting State, when seized of an action in a matter in respect of which the parties have made an agreement within the meaning of this article, shall, at the request of one of the parties, refer the parties to arbitration, unless it finds that the said agreement is null and void, inoperative or incapable of being performed." [5] [1970] 3 U. S. T. 2517, 2519, T. I. A. S. No. 6997.

But § 29 (a) of the 1934 Act makes agreements to arbitrate liabilities under § 10 of the Act "void" and "inoperative." Congress has specified a precise way whereby big and small investors will be protected and the rules under which the Alberto-Culvers of this Nation shall operate. They or their lawyers cannot waive those statutory conditions, for our corporate giants are not principalities of power but guardians of a host of wards unable to care for themselves. It is these wards that the 1934 Act tries to protect.[6] Not a word in the Convention gov-

[5] The Convention also permits that arbitral awards not be recognized and enforced when a court in the country where enforcement is sought finds that "[t]he recognition or enforcement of the award would be contrary to the public policy of that country." Art. V (2)(*b*); [1970] 3 U. S. T. 2517, 2520, T. I. A. S. No. 6997. It also provides that recognition of an award may be refused when the arbitration agreement "is not valid under the law to which the parties have subjected it," in this case the laws of Illinois. Art. V (1)(*a*). See n. 10, *infra*.

[6] Requirements promulgated under the 1934 Act require disclosure to security holders of corporate action which may affect them. Extensive annual reports must be filed with the SEC including, *inter alia*, financial figures, changes in the conduct of business, the acquisition or disposition of assets, increases or decreases in outstanding securities, and even the importance to the business of trademarks held. See 17 CFR §§ 240.13a–1, 249.310; 3 CCH Fed. Sec. L. Rep. ¶ 31,101 *et seq.* (Form 10–K). The Commission has pro-

erning awards adopts the standards which Congress has passed to protect the investors under the 1934 Act. It is peculiarly appropriate that we adhere to *Wilko*—more so even than when *Wilko* was decided. Huge foreign investments are being made in our companies. It is important that American standards of fairness in security dealings govern the destinies of American investors until Congress changes these standards.

The Court finds it unnecessary to consider Scherk's argument that this case is distinguishable from *Wilko* in that *Wilko* involved parties of unequal bargaining strength. *Ante*, at 512–513, n. 6. Instead, the Court rests its conclusion on the fact that this was an "international" agreement, with an American corporation investing in the stock and property of foreign businesses, and speaks favorably of the certainty which inheres when parties

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posed that corporations furnish a copy of annual reports filed with it to any security holder who is solicited for a proxy and requests the report. 39 Fed. Reg. 3836. Current reports must be filed with the SEC by an issuer of securities when substantial events occur, as when the rights evidenced by any class of securities are materially altered by the issuance of another class of securities or when an issuer has acquired a significant amount of assets other than in the ordinary course of business. See 17 CFR §§ 240.13a–11, 249.308; 3 CCH Fed. Sec. L. Rep. ¶ 31,001 *et seq.* (Form 8–K).

The Commission, recognizing that the Form 10–K reports filed annually with it might be excessively abstruse for security holders, see 39 Fed. Reg. 3835, has proposed that the annual reports distributed to security holders in connection with annual meetings and solicitation of proxies provide substantially greater amounts of meaningful information than required presently. These annual reports would include a description of the business of the issuer, a summary of operations, explanation of changes in revenues and expenses, information on the liquidity position and the working capital requirements of the issuer, and identification of management and performance on the market of the issuer's securities. See *id.*, at 3834–3838.

specify an arbitral forum for resolution of differences in "any contract touching two or more countries."

This invocation of the "international contract" talisman might be applied to a situation where, for example, an interest in a foreign company or mutual fund was sold to an utterly unsophisticated American citizen, with material fraudulent misrepresentations made in this country. The arbitration clause could appear in the fine print of a form contract, and still be sufficient to preclude recourse to our courts, forcing the defrauded citizen to arbitration in Paris to vindicate his rights.[7]

It has been recognized that the 1934 Act, including the protections of Rule 10b–5, applies when foreign defendants have defrauded American investors, particularly when, as alleged here,[8] they have profited by virtue

[7] The Court concedes, *ante*, at 517 n. 11, that there may be situations where foreign contacts were "so insignificant or attenuated" that *Wilko* would apply and an American court would not enforce an arbitration agreement in an international contract. The recognition that "international" contracts may in fact involve significant direct contacts with this country is realistic and salutary. But the Court by its concession undermines somewhat its reliance on its admonition—itself supported only by speculation—that "[a] contractual provision specifying in advance the forum in which disputes shall be litigated . . . is . . . an almost indispensable precondition to achievement of the orderliness and predictability essential to any international business transaction." Uncertainty and a "dicey atmosphere," supposedly destructive of international contracts, may persist for many contracts. The parties to an international contract may not in fact be bound by a "solemn agreement" to arbitrate, for an American court could find, at a much later date, sufficient contacts with this country to require the application of *Wilko*.

[8] The District Court for the Northern District of Illinois noted allegations that Scherk had failed to state a material fact, the omission of which would have been misleading, see 17 CFR § 240.10b–5 (b), during crucial negotiations in Melrose Park, Illinois, and that communications between Alberto-Culver and Scherk's attorney concerning the validity and value of the trademarks occurred within the

of proscribed conduct within our boundaries. This is true even when the defendant is organized under the laws of a foreign country, is conducting much of its activity outside the United States, and is therefore governed largely by foreign law.[9] The language of § 29 of the 1934 Act does not immunize such international transactions, and the United Nations Convention provides that a forum court in which a suit is brought need not enforce an agreement to arbitrate which is "void" and "inoperative" as contrary to its public policy.[10] When a

territorial jurisdiction of the United States. Finally, the District Court noted that the full economic impact of the alleged fraud occurred within the United States.

[9] See, *e. g.*, *Leasco Data Processing Equipment Corp.* v. *Maxwell*, 468 F. 2d 1326, 1334–1339 (CA2 1972); *Travis* v. *Anthes Imperial Ltd.*, 473 F. 2d 515, 523–528 (CA8 1973); *SEC* v. *United Financial Group, Inc.*, 474 F. 2d 354 (CA9 1973); *Schoenbaum* v. *Firstbrook*, 405 F. 2d 200 (CA2 1968); *Roth* v. *Fund of Funds*, 279 F. Supp. 935 (SDNY), aff'd, 405 F. 2d 421 (CA2 1968).

[10] A summary of the conference proceedings which led to the adoption of the United Nations Convention was prepared by G. W. Haight, who served as a member of the International Chamber of Commerce delegation to the conference. Haight, Convention on the Recognition and Enforcement of Foreign Arbitral Awards: Summary Analysis of Record of United Nations Conference, May/June 1958 (1958).

When Art. II (3) was being discussed, the Israeli delegate pointed out that while a court could, under the draft Convention as it then stood, refuse enforcement of an *award* which was incompatible with public policy, " 'the court had to refer parties to arbitration whether or not such reference was lawful or incompatible with public policy.' " *Id.*, at 27. The German delegate observed that this difficulty arose from the omission in Art. II (3) " 'of any words which would relate the arbitral agreement to an arbitral award capable of enforcement under the convention.' " *Ibid.*

Haight continues:

"When the German proposal was put to a vote, it failed to obtain a two-thirds majority (13 to 9) and the Article was thus adopted without any words linking agreements to the awards enforceable under the Convention. Nor was this omission corrected in the Report of the Drafting Committee (L.61), *although the obligation*

foreign corporation undertakes fraudulent action which subjects it to the jurisdiction of our federal securities laws, nothing justifies the conclusion that only a diluted version of those laws protects American investors.

Section 29 (a) of the 1934 Act provides that a stipulation binding one to waive compliance with "any provision" of the Act shall be void, and the Act expressly provides that the federal district courts shall have "exclusive jurisdiction" over suits brought under the Act. 15 U. S. C.

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to refer parties to arbitration was (and still is) qualified by the clause 'unless it finds that the agreement is null and void, inoperative or incapable of being performed.'

"As the applicable law is not indicated, courts may under this wording be allowed some latitude; *they may find an agreement incapable of performance if it offends the law or the public policy of the forum.* Apart from this limited opening, the Conference appeared unwilling to qualify the broad undertaking not only to recognize but also to give effect to arbitral agreements." *Id.*, at 28 (emphasis added).

Whatever "concern" the delegates had that signatories to the Convention "not be permitted to decline enforcement of such agreements on the basis of parochial views of their desirability," *ante*, at 520 n. 15, it would seem that they contemplated that a court may decline to enforce an agreement which offends its law or public policy.

The Court also attempts to treat this case as only a minor variation of *The Bremen* v. *Zapata Off-Shore Co.*, 407 U. S. 1. In that case, however, the Court, per MR. CHIEF JUSTICE BURGER, explicitly stated:

"A contractual choice-of-forum clause should be held unenforceable if enforcement would contravene a strong public policy of the forum in which suit is brought, whether declared by statute or by judicial decision." *Id.*, at 15.

That is inescapably the case here, as § 29 of the Securities Exchange Act and *Wilko* v. *Swan* make clear. Neither § 29, nor the Convention on international arbitration, nor *The Bremen* justifies abandonment of a national public policy that securities claims be heard by a judicial forum simply because some international elements are involved in a contract.

§ 78aa. The Court appears to attach some significance to the fact that the specific provisions of the 1933 Act involved in *Wilko* are not duplicated in the 1934 Act, which is involved in this case. While Alberto-Culver would not have the right to sue in either a state or federal forum as did the plaintiff in *Wilko,* 346 U. S., at 431, the Court deprives it of its right to have its Rule 10b–5 claim heard in a federal court. We spoke at length in *Wilko* of this problem, elucidating the undesirable effects of remitting a securities plaintiff to an arbitral, rather than a judicial, forum. Here, as in *Wilko,* the allegations of fraudulent misrepresentation will involve "subjective findings on the purpose and knowledge" of the defendant, questions ill-determined by arbitrators without judicial instruction on the law. See *id.,* at 435. An arbitral award can be made without explication of reasons and without development of a record, so that the arbitrator's conception of our statutory requirement may be absolutely incorrect yet functionally unreviewable, even when the arbitrator seeks to apply our law. We recognized in *Wilko* that there is no judicial review corresponding to review of court decisions. *Id.,* at 436–437. The extensive pretrial discovery provided by the Federal Rules of Civil Procedure for actions in district court would not be available. And the wide choice of venue provided by the 1934 Act, 15 U. S. C. § 78aa, would be forfeited. See *Wilko* v. *Swan, supra,* at 431, 435. The loss of the proper judicial forum carries with it the loss of substantial rights.[11]

[11] The agreements in this case provided that the "laws of the State of Illinois" are applicable. Even if the arbitration court should read this clause to require application of Rule 10b–5's standards, Alberto-Culver's victory would be Pyrrhic. The arbitral court may improperly interpret the substantive protections of the Rule, and if it does its error will not be reviewable as would the error of a federal court. And the ability of Alberto-Culver to prosecute its

When a defendant, as alleged here, has, through proscribed acts within our territory, brought itself within the ken of federal securities regulation, a fact not disputed here, those laws—including the controlling principles of *Wilko*—apply whether the defendant is foreign or American, and whether or not there are transnational elements in the dealings. Those laws are rendered a chimera when foreign corporations or funds—unlike domestic defendants—can nullify them by virtue of arbitration clauses which send defrauded American investors to the uncertainty of arbitration on foreign soil, or, if those investors cannot afford to arbitrate their claims in a far-off forum, to no remedy at all.

Moreover, the international aura which the Court gives this case is ominous. We now have many multinational corporations in vast operations around the world—Europe, Latin America, the Middle East, and Asia.[12] The investments of many American investors turn on dealings by these companies. Up to this day, it has been assumed by reason of *Wilko* that they were all protected by our various federal securities Acts. If these guarantees are to be removed, it should take a legislative enactment. I would enforce our laws as they stand, unless Congress makes an exception.

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claim would be eviscerated by lack of discovery. These are the policy considerations which underlay *Wilko* and which apply to the instant case as well.

[12] See Knickerbocker, Oligopolistic Reaction and Multinational Enterprise (Haw. Univ. 1973); J. Vaupel & J. Curhan, The World's Multinational Enterprises (Harvard Univ. 1973). See generally Senate Committee on Finance, 93d Cong., 1st Sess., Implications of Multinational Firms for World Trade and Investment and for U. S. Trade and Labor (Comm. Print 1973); Morgan, Controlling the Multinationals, Washington Post, Nov. 17, 1973, p. A15; Diebold, Precarious Path of the Multinationals, Wall Street Journal, Aug. 17, 1973, p. 6, col. 4.

The virtue of certainty in international agreements may be important, but Congress has dictated that when there are sufficient contacts for our securities laws to apply, the policies expressed in those laws take precedence. Section 29 of the 1934 Act, which renders arbitration clauses void and inoperative, recognizes no exception for fraudulent dealings which incidentally have some international factors. The Convention makes provision for such national public policy in Art. II (3). Federal jurisdiction under the 1934 Act will attach only to some international transactions, but when it does, the protections afforded investors such as Alberto-Culver can only be full-fledged.

Syllabus

MORTON, SECRETARY OF THE INTERIOR, ET AL. *v.* MANCARI ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW MEXICO

No. 73–362. Argued April 24, 1974—Decided June 17, 1974*

Appellees, non-Indian employees of the Bureau of Indian Affairs (BIA), brought this class action claiming that the employment preference for qualified Indians in the BIA provided by the Indian Reorganization Act of 1934 contravened the anti-discrimination provisions of the Equal Employment Opportunities Act of 1972, and deprived them of property rights without due process of law in violation of the Fifth Amendment. A three-judge District Court held that the Indian preference was implicitly repealed by § 11 of the 1972 Act proscribing racial discrimination in most federal employment, and enjoined appellant federal officials from implementing any Indian employment preference policy in the BIA. *Held:*

1. Congress did not intend to repeal the Indian preference, and the District Court erred in holding that it was repealed by the 1972 Act. Pp. 545–551.

(a) Since in extending general anti-discrimination machinery to federal employment in 1972, Congress in no way modified and thus reaffirmed the preferences accorded Indians by §§ 701 (b) and 703 (i) of Title VII of the Civil Rights Act of 1964 for employment by Indian tribes or by private industries located on or near Indian reservations, it would be anomalous to conclude that Congress intended to eliminate the longstanding Indian preferences in BIA employment, as being racially discriminatory. Pp. 547–548.

(b) In view of the fact that shortly after it passed the 1972 Act Congress enacted *new* Indian preference laws as part of the Education Amendments of 1972, giving Indians preference in Government programs for training teachers of Indian children, it is improbable that the same Congress condemned the BIA preference as racially discriminatory. Pp. 548–549.

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*Together with No. 73–364, *Amerind* v. *Mancari et al.*, also on appeal from the same court.

(c) The 1972 extension of the Civil Rights Act to Government employment being largely just a codification of prior anti-discrimination Executive Orders, with respect to which Indian preferences had long been treated as exceptions, there is no reason to presume that Congress affirmatively intended to erase such preferences. P. 549.

(d) This is a prototypical case where an adjudication of repeal by implication is not appropriate, since the Indian preference is a longstanding, important component of the Government's Indian program, whereas the 1972 anti-discrimination provisions, being aimed at alleviating minority discrimination in employment, are designed to deal with an entirely different problem. The two statutes, thus not being irreconcilable, are capable of co-existence, since the Indian preference, as a specific statute applying to a specific situation, is not controlled or nullified by the general provisions of the 1972 Act. Pp. 549–551.

2. The Indian preference does not constitute invidious racial discrimination in violation of the Due Process Clause of the Fifth Amendment but is reasonable and rationally designed to further Indian self-government. Pp. 551–555.

(a) If Indian preference laws, which were derived from historical relationships and are explicitly designed to help only Indians, were deemed invidious racial discrimination, 25 U. S. C. in its entirety would be effectively erased and the Government's commitment to Indians would be jeopardized. Pp. 551–553.

(b) The Indian preference does not constitute "racial discrimination" or even "racial" preference, but is rather an employment criterion designed to further the cause of Indian self-government and to make the BIA more responsive to the needs of its constituent groups. Pp. 553–554.

(c) As long as the special treatment of Indians can be tied rationally to the fulfillment of Congress' unique obligation toward Indians, such legislative judgments will not be disturbed. Pp. 554–555.

359 F. Supp. 585, reversed and remanded.

BLACKMUN, J., delivered the opinion for a unanimous Court.

Harry R. Sachse argued the cause for appellants in No. 73–362. With him on the brief were *Solicitor General Bork, Assistant Attorney General Pottinger, Carlton R. Stoiber,* and *M. Patricia Schaffer. Harris D. Sherman*

argued the cause for appellant in No. 73–364. With him on the briefs was *Stuart J. Land.*

Gene E. Franchini argued the cause and filed a brief for appellees in both cases.†

MR. JUSTICE BLACKMUN delivered the opinion of the Court.

The Indian Reorganization Act of 1934, also known as the Wheeler-Howard Act, 48 Stat. 984, 25 U. S. C. § 461 *et seq.*, accords an employment preference for qualified Indians in the Bureau of Indian Affairs (BIA or Bureau). Appellees, non-Indian BIA employees, challenged this preference as contrary to the anti-discrimination provisions of the Equal Employment Opportunity Act of 1972, 86 Stat. 103, 42 U. S. C. § 2000e *et seq.* (1970 ed., Supp. II), and as violative of the Due Process Clause of the Fifth Amendment. A three-judge Federal District Court concluded that the Indian preference under the 1934 Act was impliedly repealed by the 1972 Act. 359 F. Supp. 585 (NM 1973). We noted probable jurisdiction in order to examine the statutory and constitutional validity of this longstanding Indian preference. 414 U. S. 1142 (1974); 415 U. S. 946 (1974).

I

Section 12 of the Indian Reorganization Act, 48 Stat. 986, 25 U. S. C. § 472, provides:

> "The Secretary of the Interior is directed to establish standards of health, age, character, experience, knowledge, and ability for Indians who may be appointed, without regard to civil-service laws,

†Briefs of *amici curiae* urging reversal were filed by *Theodore S. Hope, Jr.*, *William C. Pelster*, and *Joseph E. Fortenberry* for Montana Inter-Tribal Policy Board et al., and by *Sanford Jay Rosen* for the Mexican American Legal Defense and Educational Fund.

to the various positions maintained, now or hereafter, by the Indian Office,[1] in the administration of functions or services affecting any Indian tribe. Such qualified Indians shall hereafter have the preference to appointment to vacancies in any such positions." [2]

In June 1972, pursuant to this provision, the Commissioner of Indian Affairs, with the approval of the Secretary of the Interior, issued a directive (Personnel Management Letter No. 72–12) (App. 52) stating that the BIA's policy would be to grant a preference to qualified Indians not only, as before, in the initial hiring stage, but also in the situation where an Indian and a non-Indian, both already employed by the BIA, were competing for a promotion within the Bureau.[3] The record indicates that this policy was implemented immediately.

[1] The Indian Health Service was transferred in 1954 from the Department of the Interior to the Department of Health, Education, and Welfare. Act of Aug. 5, 1954, § 1, 68 Stat. 674, 42 U. S. C. § 2001. Presumably, despite this transfer, the reference in § 12 to the "Indian Office" has continuing application to the Indian Health Service. See 5 CFR § 213.3116 (b) (8).

[2] There are earlier and more narrowly drawn Indian preference statutes. 25 U. S. C. §§ 44, 45, 46, 47, and 274. For all practical purposes, these were replaced by the broader preference of § 12. Although not directly challenged in this litigation, these statutes, under the District Court's decision, clearly would be invalidated.

[3] The directive stated:

"The Secretary of the Interior announced today [June 26, 1972] he has approved the Bureau's policy to extend Indian Preference to training and to filling vacancies by original appointment, reinstatement and promotions. The new policy was discussed with the National President of the National Federation of Federal Employees under National Consultation Rights NFFE has with the Department. Secretary Morton and I jointly stress that careful attention must be given to protecting the Rights of non-Indian employees. The new policy provides as follows: Where two or more candidates who meet

Shortly thereafter, appellees, who are non-Indian employees of the BIA at Albuquerque,[4] instituted this class action, on behalf of themselves and other non-Indian employees similarly situated, in the United States District Court for the District of New Mexico, claiming that the "so-called 'Indian Preference Statutes,'" App. 15, were repealed by the 1972 Equal Employment Opportunity Act and deprived them of rights to property without due process of law, in violation of the Fifth Amendment.[5] Named as defendants were the Secretary of the Interior, the Commissioner of Indian Affairs, and the BIA Directors for the Albuquerque and Navajo Area Offices. Appellees claimed that implementation and enforcement of the new preference policy "placed and will continue to place [appellees] at a distinct disadvantage in competing for promotion and training programs with Indian employees, all of which has and will continue to subject the [appellees] to discrimination and deny them equal employment opportunity." App. 16.

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the established qualification requirements are available for filling a vacancy. If one of them is an Indian, he shall be given preference in filling the vacancy. This new policy is effective immediately, and is incorporated into all existing programs such as the Promotion Program. Revised Manual releases will be issued promptly for review and comment. You should take immediate steps to notify all employees and recognized unions of this policy." App. 52–53.

[4] The appellees state that none of them is employed on or near an Indian reservation. Brief for Appellees 8. The District Court described the appellees as "teachers . . . or programmers, or in computer work." 359 F. Supp. 585, 587 (NM 1973).

[5] The specific question whether § 12 of the 1934 Act authorizes a preference in promotion as well as in initial hiring was not decided by the District Court and is not now before us. We express no opinion on this issue. See *Freeman* v. *Morton*, 162 U. S. App. D. C. 358, 499 F. 2d 494 (1974). See also *Mescalero Apache Tribe* v. *Hickel*, 432 F. 2d 956 (CA10 1970), cert. denied, 401 U. S. 981 (1971) (preference held inapplicable to reduction in force).

A three-judge court was convened pursuant to 28 U. S. C. § 2282 because the complaint sought to enjoin, as unconstitutional, the enforcement of a federal statute. Appellant Amerind, a nonprofit organization representing Indian employees of the BIA, moved to intervene in support of the preference; this motion was granted by the District Court and Amerind thereafter participated at all stages of the litigation.

After a short trial focusing primarily on how the new policy, in fact, has been implemented, the District Court concluded that the Indian preference was implicitly repealed by § 11 of the Equal Employment Opportunity Act of 1972, Pub. L. 92–261, 86 Stat. 111, 42 U. S. C. § 2000e–16 (a) (1970 ed., Supp. II), proscribing discrimination in most federal employment on the basis of race.[6] Having found that Congress repealed the preference, it was unnecessary for the District Court to pass on its constitutionality. The court permanently enjoined appellants "from implementing any policy in the Bureau of Indian Affairs which would hire, promote, or reassign any person in preference to another solely for the reason that such person is an Indian." The execution and enforcement of the judgment of the District Court was

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[6] Section 2000e–16 (a) reads:

"All personnel actions affecting employees or applicants for employment (except with regard to aliens employed outside the limits of the United States) in military departments as defined in section 102 of Title 5, in executive agencies (other than the General Accounting Office) as defined in section 105 of Title 5 (including employees and applicants for employment who are paid from nonappropriated funds), in the United States Postal Service and the Postal Rate Commission, in those units of the Government of the District of Columbia having positions in the competitive service, and in those units of the legislative and judicial branches of the Federal Government having positions in the competitive service, and in the Library of Congress shall be made free from any discrimination based on race, color, religion, sex, or national origin."

stayed by MR. JUSTICE MARSHALL on August 16, 1973, pending the disposition of this appeal.

II

The federal policy of according some hiring preference to Indians in the Indian service dates at least as far back as 1834.[7] Since that time, Congress repeatedly has enacted various preferences of the general type here at issue.[8] The purpose of these preferences, as variously expressed in the legislative history, has been to give Indians a greater participation in their own self-government; [9] to further the Government's trust obliga-

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[7] Act of June 30, 1834, § 9, 4 Stat. 737, 25 U. S. C. § 45:

"[I]n all cases of the appointments of interpreters or other persons employed for the benefit of the Indians, a preference shall be given to persons of Indian descent, if such can be found, who are properly qualified for the execution of the duties."

[8] Act of May 17, 1882, § 6, 22 Stat. 88, and Act of July 4, 1884, § 6, 23 Stat. 97, 25 U. S. C. § 46 (employment of clerical, mechanical, and other help on reservations and about agencies); Act of Aug. 15, 1894, § 10, 28 Stat. 313, 25 U. S. C. § 44 (employment of herders, teamsters, and laborers, "and where practicable in all other employments" in the Indian service); Act of June 7, 1897, § 1, 30 Stat. 83, 25 U. S. C. § 274 (employment as matrons, farmers, and industrial teachers in Indian schools); Act of June 25, 1910, § 23, 36 Stat. 861, 25 U. S. C. § 47 (general preference as to Indian labor and products of Indian industry).

[9] Senator Wheeler, cosponsor of the 1934 Act, explained the need for a preference as follows:

"We are setting up in the United States a civil service rule which prevents Indians from managing their own property. It is an entirely different service from anything else in the United States, because these Indians own this property. It belongs to them. What the policy of this Government is and what it should be is to teach these Indians to manage their own business and control their own funds and to administer their own property, and the civil service has worked very poorly so far as the Indian Service is concerned . . . ." Hearings on S. 2755 and S. 3645 before the Senate Committee on Indian Affairs, 73d Cong., 2d Sess., pt. 2, p. 256 (1934).

tion toward the Indian tribes; [10] and to reduce the negative effect of having non-Indians administer matters that affect Indian tribal life.[11]

The preference directly at issue here was enacted as an important part of the sweeping Indian Reorganization Act of 1934. The overriding purpose of that particular Act was to establish machinery whereby Indian tribes would be able to assume a greater degree of self-government, both politically and economically.[12] Congress was seeking to modify the then-existing situation whereby the primarily non-Indian-staffed BIA had plenary control, for all practical purposes, over the lives and destinies of the federally recognized Indian tribes. Initial congressional proposals would have diminished substantially the role of the BIA by turning over to federally chartered self-governing Indian communities many of the func-

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[10] A letter, contained in the House Report to the 1934 Act, from President F. D. Roosevelt to Congressman Howard states:

"We can and should, without further delay, extend to the Indian the fundamental rights of political liberty and local self-government and the opportunities of education and economic assistance that they require in order to attain a wholesome American life. This is but the obligation of honor of a powerful nation toward a people living among us and dependent upon our protection." H. R. Rep. No. 1804, 73d Cong., 2d Sess., 8 (1934).

[11] "If the Indians are exposed to any danger, there is none greater than the residence among them of unprincipled white men." H. R. Rep. No. 474, 23d Cong., 1st Sess., 98 (1834) (letter dated Feb. 10, 1834, from Indian Commissioners to the Secretary of War).

[12] As explained by John Collier, Commissioner of Indian Affairs:

"[T]his bill is designed not to prevent the absorption of Indians in white communities, but rather to provide for those Indians unwilling or unable to compete in the white world some measures of self-government in their own affairs." Hearing on S. 2755 before the Senate Committee on Indian Affairs, 73d Cong., 2d Sess., pt. 1, p. 26 (1934).

tions normally performed by the Bureau.[13] Committee sentiment, however, ran against such a radical change in the role of the BIA.[14] The solution ultimately adopted was to strengthen tribal government while continuing the active role of the BIA, with the understanding that the Bureau would be more responsive to the interests of the people it was created to serve.

One of the primary means by which self-government would be fostered and the Bureau made more responsive was to increase the participation of tribal Indians in the BIA operations.[15] In order to achieve this end, it was recognized that some kind of preference and exemption from otherwise prevailing civil service requirements was necessary.[16] Congressman Howard, the House sponsor, expressed the need for the preference:

> "The Indians have not only been thus deprived of civic rights and powers, but they have been largely

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[13] Hearings on H. R. 7902, Readjustment of Indian Affairs, before the House Committee on Indian Affairs, 73d Cong., 2d Sess., 1–7 (1934) (hereafter House Hearings). See also *Mescalero Apache Tribe* v. *Jones*, 411 U. S. 145, 152–153, n. 9 (1973).

[14] House Hearings 491–497.

[15] "[Section 12] was intended to integrate the Indian into the government service connected with the administration of his affairs. Congress was anxious to promote economic and political self-determination for the Indian." *Mescalero Apache Tribe* v. *Hickel*, 432 F. 2d, at 960 (footnote omitted).

[16] "The bill admits qualified Indians to the position [*sic*] in their own service.

"Thirty-four years ago, in 1900, the number of Indians holding regular positions in the Indian Service, in proportion to the total of positions, was greater than it is today.

"The reason primarily is found in the application of the generalized civil service to the Indian Service, and the consequent exclusion of Indians from their own jobs." House Hearings 19 (memorandum dated Feb. 19, 1934, submitted by Commissioner Collier to the Senate and House Committees on Indian Affairs).

> deprived of the opportunity to enter the more important positions in the service of the very bureau which manages their affairs. Theoretically, the Indians have the right to qualify for the Federal civil service. In actual practice there has been no adequate program of training to qualify Indians to compete in these examinations, especially for technical and higher positions; and even if there were such training, the Indians would have to compete under existing law, on equal terms with multitudes of white applicants. . . . The various services on the Indian reservations are actually local rather than Federal services and are comparable to local municipal and county services, since they are dealing with purely local Indian problems. It should be possible for Indians with the requisite vocational and professional training to enter the service of their own people without the necessity of competing with white applicants for these positions. This bill permits them to do so." 78 Cong. Rec. 11729 (1934).

Congress was well aware that the proposed preference would result in employment disadvantages within the BIA for non-Indians.[17] Not only was this displacement unavoidable if room were to be made for Indians, but it was explicitly determined that gradual replacement of non-Indians with Indians within the Bureau was a desirable feature of the entire program for self-govern-

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[17] Congressman Carter, an opponent of the bill, placed in the Congressional Record the following observation by Commissioner Collier at the Committee hearings:

"[W]e must not blind ourselves to the fact that the effect of this bill if worked out would unquestionably be to replace white employees by Indian employees. I do not know how fast, but ultimately it ought to go very far indeed." 78 Cong. Rec. 11737 (1934).

ment.[18] Since 1934, the BIA has implemented the preference with a fair degree of success. The percentage of Indians employed in the Bureau rose from 34% in 1934 to 57% in 1972. This reversed the former downward trend, see n. 16, *supra,* and was due, clearly, to the presence of the 1934 Act. The Commissioner's extension of the preference in 1972 to promotions within the BIA was designed to bring more Indians into positions of responsibility and, in that regard, appears to be a logical extension of the congressional intent. See *Freeman* v. *Morton,* 162 U. S. App. D. C. 358, 499 F. 2d 494 (1974), and n. 5, *supra.*

III

It is against this background that we encounter the first issue in the present case: whether the Indian preference was repealed by the Equal Employment Opportunity Act of 1972. Title VII of the Civil Rights Act of 1964, 78 Stat. 253, was the first major piece of federal legislation prohibiting discrimination in *private* employment on the basis of "race, color, religion, sex, or national origin." 42 U. S. C. § 2000e–2 (a). Significantly, §§ 701 (b) and 703 (i) of that Act explicitly exempted from its coverage the preferential employment of Indians by Indian tribes or by industries located on or near Indian reservations. 42 U. S. C. §§ 2000e (b) and 2000e–2 (i).[19] This exemption reveals a clear congressional

[18] "It should be possible for Indians to enter the service of their own people without running the gauntlet of competition with whites for these positions. Indian progress and ambition will be enormously strengthened as soon as we adopt the principle that the Indian Service shall gradually become, in fact as well as in name, an Indian service predominantly in the hands of educated and competent Indians." *Id.,* at 11731 (remarks of Cong. Howard).

[19] Section 701 (b) excludes "an Indian Tribe" from the Act's definition of "employer." Section 703 (i) states:

"Nothing contained in this subchapter shall apply to any business or enterprise on or near an Indian reservation with respect to any

recognition, within the framework of Title VII, of the unique legal status of tribal and reservation-based activities. The Senate sponsor, Senator Humphrey, stated on the floor by way of explanation:

> "This exemption is consistent with the Federal Government's policy of encouraging Indian employment and with the special legal position of Indians." 110 Cong. Rec. 12723 (1964).[20]

The 1964 Act did not specifically outlaw employment discrimination by the Federal Government.[21] Yet the mechanism for enforcing longstanding Executive Orders forbidding Government discrimination had proved ineffective for the most part.[22] In order to remedy this, Congress, by the 1972 Act, amended the 1964 Act and

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publicly announced employment practice of such business or enterprise under which a preferential treatment is given to any individual because he is an Indian living on or near a reservation."

[20] Senator Mundt supported these exemptions on the Senate floor by claiming that they would allow Indians "to benefit from Indian preference programs now in operation or later to be instituted." 110 Cong. Rec. 13702 (1964).

[21] The 1964 Act, however, did contain a proviso, expressed in somewhat precatory language:

"That it shall be the policy of the United States to insure equal employment opportunities for Federal employees without discrimination because of race, color, religion, sex or national origin." 78 Stat. 254.

This statement of policy was re-enacted as 5 U. S. C. § 7151, 80 Stat. 523 (1966), and the 1964 Act's proviso was repealed, *id.*, at 662.

[22] "This disproportionatte [*sic*] distribution of minorities and women throughout the Federal bureaucracy and their exclusion from higher level policy-making and supervisory positions indicates the government's failure to pursue its policy of equal opportunity.

"A critical defect of the Federal equal employment program has been the failure of the complaint process. That process has impeded rather than advanced the goal of the elimination of discrimination in Federal employment. . . ." H. R. Rep. No. 92–238, on H. R. 1746, pp. 23–24 (1971).

proscribed discrimination in most areas of federal employment. See n. 6, *supra.* In general, it may be said that the substantive anti-discrimination law embraced in Title VII was carried over and applied to the Federal Government. As stated in the House Report:

> "To correct this entrenched discrimination in the Federal service, it is necessary to insure the effective application of uniform, fair and strongly enforced policies. The present law and the proposed statute do not permit industry and labor organizations to be the judges of their own conduct in the area of employment discrimination. There is no reason why government agencies should not be treated similarly. . . ." H. R. Rep. No. 92–238, on H. R. 1746, pp. 24–25 (1971).

Nowhere in the legislative history of the 1972 Act, however, is there any mention of Indian preference.

Appellees assert, and the District Court held, that since the 1972 Act proscribed racial discrimination in Government employment, the Act necessarily, albeit *sub silentio,* repealed the provision of the 1934 Act that called for the preference in the BIA of one racial group, Indians, over non-Indians:

> "When a conflict such as in this case, is present, the most recent law or Act should apply and the conflicting Preferences passed some 39 years earlier should be impliedly repealed." Brief for Appellees 7.

We disagree. For several reasons we conclude that Congress did not intend to repeal the Indian preference and that the District Court erred in holding that it was repealed.

First: There are the above-mentioned affirmative provisions in the 1964 Act excluding coverage of tribal em-

ployment and of preferential treatment by a business or enterprise on or near a reservation. 42 U. S. C. §§ 2000e (b) and 2000e–2 (i). See n. 19, *supra*. These 1964 exemptions as to private employment indicate Congress' recognition of the longstanding federal policy of providing a unique legal status to Indians in matters concerning tribal or "on or near" reservation employment. The exemptions reveal a clear congressional sentiment that an Indian preference in the narrow context of tribal or reservation-related employment did not constitute racial discrimination of the type otherwise proscribed. In extending the general anti-discrimination machinery to federal employment in 1972, Congress in no way modified these private employment preferences built into the 1964 Act, and they are still in effect. It would be anomalous to conclude that Congress intended to eliminate the longstanding statutory preferences in BIA employment, as being racially discriminatory, at the very same time it was reaffirming the right of tribal and reservation-related private employers to provide Indian preference. Appellees' assertion that Congress implicitly repealed the preference as racially discriminatory, while retaining the 1964 preferences, attributes to Congress irrationality and arbitrariness, an attribution we do not share.

Second: Three months after Congress passed the 1972 amendments, it enacted two *new* Indian preference laws. These were part of the Education Amendments of 1972, 86 Stat. 235, 20 U. S. C. §§ 887c (a) and (d), and § 1119a (1970 ed., Supp. II). The new laws explicitly require that Indians be given preference in Government programs for training teachers of Indian children. It is improbable, to say the least, that the same Congress which affirmatively approved and enacted these additional and similar Indian preferences was, at the same time, con-

demning the BIA preference as racially discriminatory. In the total absence of any manifestation of supportive intent, we are loathe to imply this improbable result.

Third: Indian preferences, for many years, have been treated as exceptions to Executive Orders forbidding Government employment discrimination.[23] The 1972 extension of the Civil Rights Act to Government employment is in large part merely a codification of prior anti-discrimination Executive Orders that had proved ineffective because of inadequate enforcement machinery. There certainly was no indication that the substantive proscription against discrimination was intended to be any broader than that which previously existed. By codifying the existing anti-discrimination provisions, and by providing enforcement machinery for them, there is no reason to presume that Congress affirmatively intended to erase the preferences that previously had coexisted with broad anti-discrimination provisions in Executive Orders.

Fourth: Appellees encounter head-on the "cardinal rule . . . that repeals by implication are not favored." *Posadas* v. *National City Bank*, 296 U. S. 497, 503 (1936); *Wood* v. *United States*, 16 Pet. 342–343, 363 (1842); *Universal Interpretive Shuttle Corp.* v. *Washington*

[23] See, *e. g.*, Exec. Order No. 7423, July 26, 1936, 1 Fed. Reg. 885–886, 3 CFR 189 (1936–1938 Comp.). When President Eisenhower issued an Order prohibiting discrimination on the basis of race in the civil service, Exec. Order No. 10577, § 4.2, Nov. 22, 1954, 19 Fed. Reg. 7521, 3 CFR 218 (1954–1958 Comp.), he left standing earlier Executive Orders containing exceptions for the Indian service. *Id.*, § 301. See also 5 CFR § 213.3112 (a)(7), which provides a civil service exemption for:

"All positions in the Bureau of Indian Affairs and other positions in the Department of the Interior directly and primarily related to the providing of services to Indians when filled by the appointment of Indians who are one-fourth or more Indian blood."

See also 5 CFR § 213.3116 (b)(8) (Indian Health Services).

Metropolitan Area Transit Comm'n, 393 U. S. 186, 193 (1968). They and the District Court read the congressional silence as effectuating a repeal by implication. There is nothing in the legislative history, however, that indicates affirmatively any congressional intent to repeal the 1934 preference. Indeed, as explained above, there is ample independent evidence that the legislative intent was to the contrary.

This is a prototypical case where an adjudication of repeal by implication is not appropriate. The preference is a longstanding, important component of the Government's Indian program. The anti-discrimination provision, aimed at alleviating minority discrimination in employment, obviously is designed to deal with an entirely different and, indeed, opposite problem. Any perceived conflict is thus more apparent than real.

In the absence of some affirmative showing of an intention to repeal, the only permissible justification for a repeal by implication is when the earlier and later statutes are irreconcilable. *Georgia* v. *Pennsylvania R. Co.*, 324 U. S. 439, 456–457 (1945). Clearly, this is not the case here. A provision aimed at furthering Indian self-government by according an employment preference within the BIA for qualified members of the governed group can readily co-exist with a general rule prohibiting employment discrimination on the basis of race. Any other conclusion can be reached only by formalistic reasoning that ignores both the history and purposes of the preference and the unique legal relationship between the Federal Government and tribal Indians.

Furthermore, the Indian preference statute is a specific provision applying to a very specific situation. The 1972 Act, on the other hand, is of general application. Where there is no clear intention otherwise, a specific statute will not be controlled or nullified by a general

one, regardless of the priority of enactment. See, *e. g.*, *Bulova Watch Co.* v. *United States,* 365 U. S. 753, 758 (1961); *Rodgers* v. *United States,* 185 U. S. 83, 87–89 (1902).

The courts are not at liberty to pick and choose among congressional enactments, and when two statutes are capable of co-existence, it is the duty of the courts, absent a clearly expressed congressional intention to the contrary, to regard each as effective. "When there are two acts upon the same subject, the rule is to give effect to both if possible . . . . The intention of the legislature to repeal 'must be clear and manifest.'" *United States* v. *Borden Co.,* 308 U. S. 188, 198 (1939). In light of the factors indicating no repeal, we simply cannot conclude that Congress consciously abandoned its policy of furthering Indian self-government when it passed the 1972 amendments.

We therefore hold that the District Court erred in ruling that the Indian preference was repealed by the 1972 Act.

IV

We still must decide whether, as the appellees contend, the preference constitutes invidious racial discrimination in violation of the Due Process Clause of the Fifth Amendment. *Bolling* v. *Sharpe,* 347 U. S. 497 (1954). The District Court, while pretermitting this issue, said: "[W]e could well hold that the statute must fail on constitutional grounds." 359 F. Supp., at 591.

Resolution of the instant issue turns on the unique legal status of Indian tribes under federal law and upon the plenary power of Congress, based on a history of treaties and the assumption of a "guardian-ward" status, to legislate on behalf of federally recognized Indian tribes. The plenary power of Congress to deal with the special problems of Indians is drawn both explicitly and im-

plicitly from the Constitution itself. Article I, § 8, cl. 3, provides Congress with the power to "regulate Commerce . . . with the Indian Tribes," and thus, to this extent, singles Indians out as a proper subject for separate legislation. Article II, § 2, cl. 2, gives the President the power, by and with the advice and consent of the Senate, to make treaties. This has often been the source of the Government's power to deal with the Indian tribes. The Court has described the origin and nature of the special relationship:

> "In the exercise of the war and treaty powers, the United States overcame the Indians and took possession of their lands, sometimes by force, leaving them an uneducated, helpless and dependent people, needing protection against the selfishness of others and their own improvidence. Of necessity, the United States assumed the duty of furnishing that protection, and with it the authority to do all that was required to perform that obligation and to prepare the Indians to take their place as independent, qualified members of the modern body politic. . . ." *Board of County Comm'rs* v. *Seber,* 318 U. S. 705, 715 (1943).

See also *United States* v. *Kagama,* 118 U. S. 375, 383–384 (1886).

Literally every piece of legislation dealing with Indian tribes and reservations, and certainly all legislation dealing with the BIA, single out for special treatment a constituency of tribal Indians living on or near reservations. If these laws, derived from historical relationships and explicitly designed to help only Indians, were deemed invidious racial discrimination, an entire Title of the United States Code (25 U. S. C.) would be effectively erased and the solemn commitment of the Government toward the Indians would be jeopardized. See

Simmons v. *Eagle Seelatsee*, 244 F. Supp. 808, 814 n. 13 (ED Wash. 1965), aff'd, 384 U. S. 209 (1966).

It is in this historical and legal context that the constitutional validity of the Indian preference is to be determined. As discussed above, Congress in 1934 determined that proper fulfillment of its trust required turning over to the Indians a greater control of their own destinies. The overly paternalistic approach of prior years had proved both exploitative and destructive of Indian interests. Congress was united in the belief that institutional changes were required. An important part of the Indian Reorganization Act was the preference provision here at issue.

Contrary to the characterization made by appellees, this preference does not constitute "racial discrimination." Indeed, it is not even a "racial" preference.[24]

[24] The preference is not directed towards a "racial" group consisting of "Indians"; instead, it applies only to members of "federally recognized" tribes. This operates to exclude many individuals who are racially to be classified as "Indians." In this sense, the preference is political rather than racial in nature. The eligibility criteria appear in 44 BIAM 335, 3.1:

".1 Policy—An Indian has preference in appointment in the Bureau. To be eligible for preference in appointment, promotion, and training, an individual must be one-fourth or more degree Indian blood and be a member of a Federally-recognized tribe. It is the policy for promotional consideration that where two or more candidates who meet the established qualification requirements are available for filling a vacancy, if one of them is an Indian, he shall be given preference in filling the vacancy. In accordance with the policy statement approved by the Secretary, the Commissioner may grant exceptions to this policy by approving the selection and appointment of non-Indians, when he considers it in the best interest of the Bureau.

"This program does not restrict the right of management to fill positions by methods other than through promotion. Positions may be filled by transfers, reassignment, reinstatement, or initial appointment." App. 92.

Rather, it is an employment criterion reasonably designed to further the cause of Indian self-government and to make the BIA more responsive to the needs of its constituent groups. It is directed to participation by the governed in the governing agency. The preference is similar in kind to the constitutional requirement that a United States Senator, when elected, be "an Inhabitant of that State for which he shall be chosen," Art. I, § 3, cl. 3, or that a member of a city council reside within the city governed by the council. Congress has sought only to enable the BIA to draw more heavily from among the constituent group in staffing its projects, all of which, either directly or indirectly, affect the lives of tribal Indians. The preference, as applied, is granted to Indians not as a discrete racial group, but, rather, as members of quasi-sovereign tribal entities whose lives and activities are governed by the BIA in a unique fashion. See n. 24, *supra*. In the sense that there is no other group of people favored in this manner, the legal status of the BIA is truly *sui generis*.[25] Furthermore, the preference applies only to employment in the Indian service. The preference does not cover any other Government agency or activity, and we need not consider the obviously more difficult question that would be presented by a blanket exemption for Indians from all civil service examinations. Here, the preference is reasonably and directly related to a legitimate, nonracially based goal. This is the principal characteristic that generally is absent from proscribed forms of racial discrimination.

On numerous occasions this Court specifically has upheld legislation that singles out Indians for particular

[25] Senator Wheeler described the BIA as "an entirely different service from anything else in the United States." Hearings on S. 2755 and S. 3645 before the Senate Committee on Indian Affairs, 73d Cong., 2d Sess., pt. 2, p. 256 (1934).

and special treatment. See, *e. g., Board of County Comm'rs* v. *Seber,* 318 U. S. 705 (1943) (federally granted tax immunity); *McClanahan* v. *Arizona State Tax Comm'n,* 411 U. S. 164 (1973) (same); *Simmons* v. *Eagle Seelatsee,* 384 U. S. 209 (1966), aff'g 244 F. Supp. 808 (ED Wash. 1965) (statutory definition of tribal membership, with resulting interest in trust estate); *Williams* v. *Lee,* 358 U. S. 217 (1959) (tribal courts and their jurisdiction over reservation affairs). Cf. *Morton* v. *Ruiz,* 415 U. S. 199 (1974) (federal welfare benefits for Indians "on or near" reservations). This unique legal status is of long standing, see *Cherokee Nation* v. *Georgia,* 5 Pet. 1 (1831); *Worcester* v. *Georgia,* 6 Pet. 515 (1832), and its sources are diverse. See generally U. S. Dept. of Interior, Federal Indian Law (1958); Comment, The Indian Battle for Self-Determination, 58 Calif. L. Rev. 445 (1970). As long as the special treatment can be tied rationally to the fulfillment of Congress' unique obligation toward the Indians, such legislative judgments will not be disturbed. Here, where the preference is reasonable and rationally designed to further Indian self-government, we cannot say that Congress' classification violates due process.

The judgment of the District Court is reversed and the cases are remanded for further proceedings consistent with this opinion.

It is so ordered.

GILMORE ET AL. *v.* CITY OF MONTGOMERY, ALABAMA, ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 72–1517. Argued January 15–16, 1974—Decided June 17, 1974

Petitioners, Negro citizens of Montgomery, Ala., brought this class action in 1958 to desegregate the city's public parks, and in 1959 the District Court ordered the parks desegregated. The Court of Appeals affirmed, and ordered the District Court to retain jurisdiction. Thereafter, however, segregated recreational programs were continued by the city in cooperation with the YMCA, public swimming pools were closed allegedly to prevent the mixing of races, and recreational facilities in Negro neighborhoods were not maintained equally with those in white neighborhoods. The petitioners by motion in 1970 reopened the litigation based on facts developed in *Smith* v. *YMCA*, 316 F. Supp. 899 (MD Ala. 1970), in which relief was obtained against the "coordinated effort" of the city and the YMCA to perpetuate the segregated parks. The claims raised by the 1970 motion were settled by agreement. In 1971 the petitioners filed the "Motion for Supplemental Relief," which forms the basis for the present phase of the litigation, complaining that the city was permitting racially segregated schools and other segregated private groups and clubs to use city parks and recreational facilities. The District Court enjoined the city and its officials from permitting or sanctioning the use of city recreational facilities by any racially segregated private school or affiliated group, or by any private nonschool group, club, or organization that has a racially discriminatory admissions policy. The Court of Appeals sustained the injunction insofar as the use of city facilities by segregated private schools was "exclusive" and not in common with other citizens, but reversed the injunction as it applied to "nonexclusive" use by segregated private schools and to use by nonschool groups. The court found an insufficient threat to desegregated public education to support an injunction restraining nonexclusive use by private school groups, and no "symbiotic relationship" between the city and nonschool groups so that the injunction impermissibly

intruded upon the freedom of association of citizens who were members of such groups. *Held:*

1. The city was properly enjoined from permitting exclusive access to its recreational facilities by segregated private schools and by groups affiliated with such schools. Pp. 566–569.

(a) Using the term "exclusive use" as implying that an entire facility is exclusively, and completely, in the possession, control, and use of a private group, and as also implying, without mandating, a decisionmaking role for the city in allocating such facilities among private and public groups, the city's policy of allocating facilities to segregated private schools, in the context of the 1959 order and subsequent history, created, in effect, "enclaves of segregation" and deprived petitioners of equal access to parks and recreational facilities. Pp. 566–567.

(b) The exclusive use and control of city recreational facilities, however temporary, by private segregated schools were little different from the city's agreement with the YMCA to run a "coordinated" but, in effect, segregated recreational program. This use carried the brand of "separate but equal" and, in the circumstances of this case, was properly terminated by the District Court. Pp. 567–568.

(c) More importantly, the city's policies operated directly to contravene an outstanding school desegration order, and any arrangement, implemented by state officials at any level, that significantly tends to perpetuate a dual school system, in whatever manner, is constitutionally impermissible. Pp. 568–569.

2. On the record, it is not possible to determine whether the use of the city's recreational facilities by private school groups in common with others, and by private nonschool organizations, involved the city so directly in the actions of those users as to warrant court intervention on constitutional grounds. Pp. 569–574.

(a) The record does not contain sufficient facts upon which to predicate legal judgment as to whether certain uses of city facilities in common by private school groups or exclusively or in common by nonschool groups contravened the parks desegregation order or the school desegregation order, or in some way constitute "state action" ascribing to the city the discriminatory actions of the groups in question. P. 570.

(b) The portion of the District Court's order prohibiting the mere use of city recreational facilities by *any* segregated "private group, club or organization" is invalid because it was not pred-

icated upon a proper finding of state action. *Moose Lodge No. 107* v. *Irvis*, 407 U. S. 163, distinguished. Pp. 572–574.

473 F. 2d 832, reversed in part, and remanded.

BLACKMUN, J., delivered the opinion of the Court, in which BURGER, C. J., and STEWART, POWELL, and REHNQUIST, JJ., joined. MARSHALL, J., filed an opinion concurring in part and dissenting in part, *post*, p. 576. BRENNAN, J., filed an opinion concurring in the judgment, *post*, p. 577. WHITE, J., filed an opinion concurring in the judgment, in which DOUGLAS, J., joined, *post*, p. 581.

Joseph J. Levin, Jr., argued the cause for petitioners. With him on the briefs was *Morris S. Dees, Jr.*

Joseph D. Phelps argued the cause for respondents. With him on the brief were *Drayton N. Hamilton* and *Walter J. Knabe.*

MR. JUSTICE BLACKMUN delivered the opinion of the Court.

The present phase of this prolonged litigation concerns the propriety of a federal court's enjoining a municipality from permitting the use of public park recreational facilities by private segregated school groups and by other non-school groups that allegedly discriminate in their membership on the basis of race. We granted certiorari to consider this important issue. 414 U. S. 907 (1973).

I

Petitioners are Negro citizens of Montgomery, Alabama. In December 1958, now over 15 years ago, they instituted this class action to desegregate Montgomery's public parks. The defendants are the city, its Board of Commissioners and the members thereof, the Parks and Recreation Board and its members, and the Superintendent of the Parks and Recreational Program.

By their original complaint, the petitioners specifically challenged, on Fourteenth Amendment due process and

equal protection grounds, a Montgomery ordinance (No. 21–57, adopted June 4, 1957) which made it a misdemeanor, subject to fine and imprisonment, "for white and colored persons to enter upon, visit, use or in any way occupy public parks or other public houses or public places, swimming pools, wadding [*sic*] pools, beaches, lakes or ponds except those assigned to their respective races." Both declaratory and injunctive relief were requested.[1] On September 9, 1959, the District Court entered its judgment that the ordinance was unconstitutional and enjoined the defendants from enforcing the ordinance "or any custom, practice, policy or usage which may require plaintiffs, or any other Negroes similarly situated, to submit to enforced segregation solely because of race or color in their use of any public parks owned and operated by the City of Montgomery, Alabama." The judgment was accompanied by a memorandum opinion. 176 F. Supp. 776 (MD Ala. 1959). On appeal, the Fifth Circuit affirmed but ordered the judgment modified to provide that the District Court retain jurisdiction. 277 F. 2d 364, 368 (1960). The trial court, accordingly, ruled

[1] Prior to the institution of the suit, some of the plaintiffs had petitioned the city's Parks and Recreation Board, and the plaintiffs and others had petitioned the city's Board of Commissioners to provide access to the city parks for petitioners and all other Negro citizens similarly situated. The chairman of the Parks and Recreation Board replied that the Board "has no authority in this matter." The Board of Commissioners responded, "The Commission will not operate integrated parks." Exhibits attached to complaint filed Dec. 22, 1958, in Civil Action No. 1490–N, United States District Court for the Middle District of Alabama, Northern Division.

Within days after petitioners filed their suit, the city authorities, by resolution effective January 1, 1959, closed all the city's recreational parks, athletic fields, swimming facilities, and playgrounds, to all persons, white and black, and did not purport officially to reopen them until 1965. The city continued, however, to own and maintain them.

that it "will and does hereby retain jurisdiction of this cause until further order." [2]

In 1970, the petitioners sought to reopen the litigation. They filed a motion asking, among other relief, that the respondents be cited for contempt "for deliberately avoiding and violating this Court's Judgment and Order in this case." [3] The motion contained allegations that some of the municipal parks had been reopened "in such a manner to avoid the total and full integration of said parks"; that the city had conspired with the Montgomery YMCA to segregate swimming and other recreational facilities and programs; that recreational facilities were unequally allocated as between white and Negro neighborhoods; and that the city discriminated in its employment of personnel in recreational programs. The basis for these claims arose from other, separate litigation initiated in 1969 and resulting in the granting of affirmative relief to the plaintiffs in that suit. See *Smith* v. *Young Men's Christian Assn.*, 316 F. Supp. 899 (MD Ala. 1970), aff'd as modified, 462 F. 2d 634 (CA5 1972). In that action the District Court found that the "coordinated effort" of the city and of the YMCA, 316 F. Supp., at 908, and an agreement between them, reached shortly before the closing of the city parks and the entry of the court's 1959 decree, had effectuated "the perpetuation of segregated recreational facilities and programs in the City of Montgomery," *id.*, at 909, and that it was "unmistakably clear that its purpose was to circumvent the Supreme Court's

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[2] On April 22, 1964, after the case had lain dormant for four years, the District Court ordered the file closed "without prejudice to any party to this litigation petitioning this Court for a reinstatement."

[3] Petitioners' motion, filed August 7, 1970, was styled as a "Motion to Cite Defendants for Contempt and for Relief." On October 2, the District Court granted the further motion of the petitioners that the August 7 motion be treated as an amendment to the original complaint.

and this Court's desegregation rulings in the area of public recreation." *Id.*, at 908.[4] As summarized by the Court of Appeals, the District Court concluded:

> "[T]he YMCA, as a result of the cooperative agreement, has been performing a statutorily declared 'public function'; the Montgomery Park and Recreation Board has, in effect, transferred some of its statutory authority and responsibility to the YMCA, thereby investing the YMCA with a municipal character; and therefore the YMCA has been serving as a municipal rather than a private agency in assisting the Park Board in providing recreational programs for the city.
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> . . . . .

[4] The record in that case revealed a deliberate attempt to thwart the desegregation order of the District Court. In 1958, the city and the YMCA formed a coordination committee. It was agreed that the YMCA would not offer any program that would duplicate or conflict with one offered by the city's recreation department. The YMCA conducted football, basketball, and track programs for all the elementary school children of the city, but not for the junior high students. The responsibility for administering junior high programs was delegated to the Recreation Department. Each elementary school supposedly was assigned to the nearest YMCA branch. Yet the District Court found that "every predominantly white school in the city is assigned to one of the three all-white branches even though the school may be closer to the Cleveland Avenue [Negro] branch. Every predominantly Negro school is, regardless of its location, assigned to the Cleveland Avenue branch." 316 F. Supp., at 905. The YMCA also was given free use of the city's parks, playgrounds, and lighting equipment for its various athletic programs, and free water for its swimming pools. The city did not reopen its pools after it closed the parks in 1959. "In 1957, the YMCA operated one small branch in downtown Montgomery which had less than 1,000 members. By 1960, two years after the 'Co-ordination Committee' had been created, it operated five branches with five swimming pools. Today the YMCA operates six branches with eight swimming pools and has approximately 18,000 members." *Id.*, at 908.

> "[T]he YMCA's discriminatory conduct denied the plaintiffs their Fourteenth Amendment rights to Equal Protection of the law; under the facts of this case the plaintiffs' showing of 'state action' satisfies the requirement under Title 42, U. S. C. Section 1983 that the YMCA's conduct be 'under color of law.'" 462 F. 2d, at 641–642.

The modification by the Court of Appeals related only to the disapproval of a provision in the District Court's order directing a specific Negro-white ratio in the YMCA's board and executive committee. No review was sought here.

The claims raised by the petitioners in their 1970 motion were settled by agreement dated January 29, 1971.[5] On July 29, the respondents filed their first written progress report. On September 8, the petitioners filed a "Motion for Supplemental Relief." App. 15. This motion forms the basis for the present phase of the litigation. The petitioners complained that the city was permitting racially segregated schools and other segregated private groups and clubs to use city parks and recreational facilities. They requested injunctive relief against "the use of City owned and operated recreational facilities by any private school group, club, or organiza-

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[5] The settlement agreement appears to have been aimed at providing equal recreational facilities for the Negro population of Montgomery. It specified the construction of new community centers and a new recreation center. Improvements were to be made to existing predominantly Negro facilities. The city agreed to maintain all community centers "on an equal basis and to the same manner and extent."

The agreement was approved by the District Court on January 29, 1971. Jurisdiction, however, was "specifically retained," and the defendants were ordered to file a written progress report every six months.

tion which is racially segregated or which has a racially discriminatory admissions policy."

The District Court granted the petitioners the relief they requested. 337 F. Supp. 22 (MD Ala. 1972). The court reasoned that Montgomery officials were under an affirmative duty to bring about and to maintain a desegregated public school system. Providing recreational facilities to *de facto* or *de jure* segregated private schools was inconsistent with that duty because such aid enhanced the attractiveness of those schools, generated capital savings that could be used to improve their private educational offerings, and provided means to raise other revenue to support the institutions, all to the detriment of establishing the constitutionally mandated unitary public school system. The court, consequently, enjoined the city and its officials "from permitting or in any way sanctioning the use of city owned or operated recreational facilities by any private school, or private school affiliated group, if such school or group is racially segregated or if it has a racially discriminatory admissions policy." *Id.*, at 26. The court went on, however, with sparse findings and brief discussion, and similarly enjoined the city and its officials from permitting or sanctioning the use of city recreational facilities "by any private group, club or organization which is not affiliated with a private school and which has a racially discriminatory admissions policy." *Ibid.*[6]

On appeal, the Court of Appeals reversed in part and remanded the case with directions. 473 F. 2d 832 (CA5

[6] The District Court's decretal provisions in full text, except for a paragraph relating to the taxation of costs, are:

"1. That the City of Montgomery, Alabama's policy and practice of permitting the use of city owned or operated recreational facilities by any private school, or private school affiliated group, which school

1973). It sustained that part of the injunction which restrained the use of city facilities by segregated private schools when that use was "exclusive" and not in common with other citizens. *Id.*, at 837. The court ruled, however, that "nonexclusive enjoyment" of those facilities by private school children "was not proven to present a sufficient threat to desegregated public education to support an injunction restraining the clear personal right of the affected children to enjoy such usage in common with the rest of the public." *Ibid.* With respect to that portion of the District Court's order concerning other private nonschool groups, the Court of Appeals held that there was no "symbiotic relationship" of the kind present and condemned in *Burton* v. *Wilmington Parking Authority*, 365 U. S. 715 (1961). Consequently, it held that under *Moose Lodge No. 107* v. *Irvis*, 407 U. S. 163 (1972), that portion of the District Court's order dealing with

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or group is racially segregated or which has a racially discriminatory admissions policy be and the same is hereby declared unconstitutional.

"2. That said City of Montgomery, Alabama, its officers, agents, servants, employees, and those acting in concert with it, be and each is hereby enjoined from permitting or in any way sanctioning the use of city owned or operated recreational facilities by any private school, or private school affiliated group, if such school or group is racially segregated or if it has a racially discriminatory admissions policy.

"3. That said City of Montgomery, Alabama's policy and practice of permitting the use of city owned or operated recreational facilities by any private group, club or organization which has a racially discriminatory admissions policy be and the same is hereby declared unconstitutional.

"4. That said City of Montgomery, Alabama, its officers, agents, servants, employees and those acting in concert with it, be and each is hereby enjoined from permitting or in any way sanctioning the use of city owned or operated recreational facilities by any private group, club or organization which is not affiliated with a private school and which has a racially discriminatory admissions policy." 337 F. Supp., at 26.

nonschool groups had to be reversed because the injunction impermissibly intruded upon the freedom of association of citizens who were members of private groups. The court, accordingly, ordered deletion of certain paragraphs of the injunctive order and the clarification of others. 473 F. 2d, at 839–840. The District Court complied with that mandate and, in particular, added the following paragraph to its injunctive order:

> "The injunction issued by this Court does not prohibit the City of Montgomery from permitting non-exclusive access to public recreational facilities and general government services by private schools or school affiliated groups."

The plaintiffs petitioned for certiorari; the defendants did not cross-petition.

II

The Equal Protection Clause of the Fourteenth Amendment does not prohibit the "[i]ndividual invasion of individual rights." *Civil Rights Cases,* 109 U. S. 3, 11 (1883). It does proscribe, however, state action "of every kind" that operates to deny any citizen the equal protection of the laws. *Ibid.* This proscription on state action applies *de facto* as well as *de jure* because "[c]onduct that is formally 'private' may become so entwined with governmental policies or so impregnated with a governmental character as to become subject to the constitutional limitations placed upon state action." *Evans* v. *Newton,* 382 U. S. 296, 299 (1966). In the present case we must determine whether the city of Montgomery engaged in discriminatory activity violative of the parks desegregation order. We must also decide whether the city's involvement in the alleged discriminatory activity of segregated private schools and other private groups,

through its providing recreational facilities, constitutes "state action" subject to constitutional limitation.

A

The Court of Appeals affirmed the District Court insofar as the latter enjoined the "exclusive possession of public recreational facilities such as football stadiums, baseball diamonds, basketball courts, and tennis courts for official athletic contests and similar functions sponsored by racially segregated private schools." 473 F. 2d, at 836–837. The boundaries of this "exclusive" use approach, however, are not self-evident. We find the concept helpful not so much as a controlling legal principle but as a description of a type of use and, in the context of this case, suggestive of a means of allocating public recreational facilities. The term "exclusive use" implies that an entire facility is exclusively, and completely, in the possession, control, and use of a private group.[7] It also implies, without mandating, a decision-making role for the city in allocating such facilities among private and, for that matter, public groups.

Upon this understanding of the term, we agree with petitioners that the city's policy of allocating facilities to segregated private schools, in the context of the 1959 parks desegregation order and subsequent history, created, in effect, "enclaves of segregation" and deprived petitioners of equal access to parks and recreational facilities. The city was under an affirmative constitu-

[7] We understand the term "exclusive use" not to include the situation where only part of a facility may be allocated to or used by a group, even though that allocation or use results in the *pro tanto* exclusion of others. For example, the use of two of a total of 10 tennis courts by a private school group would not constitute an exclusive use; the use of all 10 courts would. This is not to say that the use of two by a private school group would be constitutionally permissible. See discussion, *infra*, at 570–571, n. 10.

tional duty to eliminate every "custom, practice, policy or usage" reflecting an "impermissible obeisance to the now thoroughly discredited doctrine of 'separate but equal.'" *Watson* v. *Memphis*, 373 U. S. 526, 538 (1963). This obviously meant that discriminatory practices in Montgomery parks and recreational facilities were to be eliminated "root and branch," to use the phrase employed in *Green* v. *County School Board of New Kent County*, 391 U. S. 430, 438 (1968).

Instead of prompt and orderly compliance with the District Court's mandate, however, the city of Montgomery engaged in an elaborate subterfuge to anticipate and circumvent the court's order. Segregated recreational programs continued to be presented through the conveniently cooperating private agency of the local YMCA. All public swimming pools were closed allegedly to prevent the mixing of races. Facilities in Negro neighborhoods were not maintained equally with those in white neighborhoods. In light of these facts, made part of the record in this case,[8] it was entirely appropriate for the District Court carefully to scrutinize any practice or policy that would tend to abandon to segregated private groups facilities normally open to members of all races on an equal basis. Here, the exclusive use and control of city recreational facilities, however temporary, by private segregated schools were little different from the city's agreement with the YMCA to run a "coordinated" but, in effect, segregated recreational program. Such use and control carried the brand of "separate but equal" and, in

[8] Petitioners requested that the District Court take notice in this case of *Smith* v. *Young Men's Christian Assn.*, 316 F. Supp. 899 (1970), in which the same District Judge had presided. The trial court ruled from the bench that it would take judicial notice "of the evidence that was presented in the Y. M. C. A. case." Excerpted transcript, testimony of William Chandler, Nov. 20, 1970, p. 7.

the circumstances of this case, were properly terminated by the District Court.

Particularly important is the fact that the city's policies operated directly to contravene an outstanding school desegregation order. See *Carr* v. *Montgomery County Board of Education*, 232 F. Supp. 705 (MD Ala. 1964); 253 F. Supp. 306 (1966); 289 F. Supp. 647 (1968), aff'd as modified, 400 F. 2d 1 and 402 F. 2d 782, 784, 787 (CA5 1968), rev'd and remanded *sub nom. United States* v. *Montgomery County Board of Education*, with directions to affirm the judgment of the District Court, 395 U. S. 225 (1969).[9] Certainly, the city's officials were aware of this order and were responsible for seeing that no actions on their part would significantly impede the progress of school desegregation in the city. *Cooper* v. *Aaron*, 358 U. S. 1 (1958); *Green* v. *County School Board of New Kent County*, 391 U. S., at 437–438; *Alexander* v. *Holmes County Board of Education*, 396 U. S. 19, 20 (1969). Any arrangement, implemented by state officials at any level, which significantly tends to perpetuate a dual school system, in whatever manner, is constitutionally impermissible. "[T]he constitutional rights of children not to be discriminated against . . . can neither be nullified openly and directly by state legislators or state executive or judicial officers, nor nullified indirectly by them through evasive schemes for segregation whether attempted 'ingeniously or ingenuously.'" *Cooper* v. *Aaron*, 358 U. S., at 17. This means that any tangible state assistance, outside the generalized services government might provide to private segregated schools in common with other schools, and with all citizens, is consti-

[9] Petitioners also requested that the District Court in this case take notice of *Carr* v. *Montgomery County Board of Education*, *supra*. The trial court in its reported opinion, 337 F. Supp., at 24, referred to the duty of the State's school boards to desegregate.

tutionally prohibited if it has "a significant tendency to facilitate, reinforce, and support private discrimination." *Norwood* v. *Harrison*, 413 U. S. 455, 466 (1973). The constitutional obligation of the State "requires it to steer clear, not only of operating the old dual system of racially segregated schools, but also of giving significant aid to institutions that practice racial or other invidious discrimination." *Id.*, at 467.

Here, the city's actions significantly enhanced the attractiveness of segregated private schools, formed in reaction against the federal court school order, by enabling them to offer complete athletic programs. The city's provision of stadiums and recreational fields resulted in capital savings for those schools and enabled them to divert their own funds to other educational programs. It also provided the opportunity for the schools to operate concessions that generated revenue. We are persuaded, as were both the District Court and the Court of Appeals, that this assistance significantly tended to undermine the federal court order mandating the establishment and maintenance of a unitary school system in Montgomery. It therefore was wholly proper for the city to be enjoined from permitting exclusive access to public recreational facilities by segregated private schools and by groups affiliated with such schools.

B

Although the Court of Appeals ruled out the *exclusive* use of city facilities by private schools, it went on to modify the District Court order "to make clear that the City of Montgomery is not prohibited from permitting nonexclusive access to public recreational facilities and general government services by private schools or school affiliated groups," 473 F. 2d, at 840, or from permitting access to these facilities by private organizations that have a racially discriminatory admissions policy. *Id.*, at 839.

Upon this record, we are unable to draw a conclusion as to whether the use of zoos, museums, parks, and other recreational facilities by private school groups in common with others, and by private nonschool organizations, involves government so directly in the actions of those users as to warrant court intervention on constitutional grounds.

It would be improper to determine at this stage the appropriateness of further relief in all the many and varied situations where facilities are used in common by school groups or used exclusively or in common by private groups. It is possible that certain uses of city facilities will be judged to be in contravention of the parks desegregation order or the school desegregation order, or in some way to constitute impermissible "state action" ascribing to the city the discriminatory actions of the groups. The record before us does not contain sufficient facts upon which to predicate legal judgments of this kind. The questions to be resolved and the decisions to be made rest upon careful identification of the different types of city facilities that are available and the various uses to which they might be put by private groups.[10]

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[10] The Brethren in concurrence state that they would sustain the District Court insofar as any school-sponsored or school-directed uses of the city recreational facilities enable private segregated schools to duplicate public school operations at public expense. It hardly bears repetition that the District Court's original injunction swept beyond these limits without the factfinding required for the prudent use of what would otherwise be the raw exercise of a court's equitable power.

It is by no means apparent, as our Brother BRENNAN correctly notes, which uses of city facilities in common with others would have "a significant tendency to facilitate, reinforce, and support private discrimination." *Norwood* v. *Harrison*, 413 U. S. 455, 466 (1973). Moreover, we are not prepared, at this juncture and on this record, to assume the standing of these plaintiffs to claim relief against certain nonexclusive uses by private school groups. The

The difficulties that confront us on this record are readily apparent. Under appropriate circumstances, the District Court might conclude, as it did in the instance of exclusive use by private schools, that access in common to city facilities by private school groups would indeed contravene the school desegregation order. For example, all-white private school basketball teams might be invited to participate in a tournament conducted on public recreational facilities with desegregated private and public school teams. Because "discriminatory treatment exerts a pervasive influence on the entire educational process," *Norwood* v. *Harrison,* 413 U. S., at 469, citing *Brown* v. *Board of Education,* 347 U. S. 483 (1954), such assistance, although proffered in common with fully desegregated groups, might so directly impede the progress of court-ordered school desegregation within the city that it would be appropriate to fashion equitable relief "adjusting and reconciling public and private needs." *Brown* v. *Board of Education,* 349 U. S. 294, 300 (1955). The essential finding justifying further relief would be a showing of direct impairment of an outstanding school desegregation order. *Cooper* v. *Aaron,* 358 U. S., at 17; *Bush* v. *Orleans Parish School Board,* 364 U. S. 500 (1960); *Brown* v. *South Carolina State Board of Education,* 296 F. Supp. 199 (SC), aff'd, 393 U. S. 222 (1968); *Poindexter* v.

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plaintiffs in *Norwood* were parties to a school desegregation order and the relief they sought was directly related to the concrete injury they suffered. Here, the plaintiffs were parties to an action desegregating the city parks and recreational facilities. Without a properly developed record, it is not clear that every nonexclusive use of city facilities by school groups, unlike their exclusive use, would result in cognizable injury to these plaintiffs. The District Court does not have carte blanche authority to administer city facilities simply because there is past or present discrimination. The usual prudential tenets limiting the exercise of judicial power must be observed in this case as in any other.

Louisiana Financial Assistance Comm'n, 275 F. Supp. 833 (ED La. 1967), aff'd, 389 U. S. 571 (1968); *Lee* v. *Macon County Board of Education*, 267 F. Supp. 458 (MD Ala.), aff'd, *sub nom. Wallace* v. *United States*, 389 U. S. 215 (1967); *Norwood* v. *Harrison*, *supra*.

Relief would also be appropriate if a particular use constitutes a vestige of the type of state-sponsored racial segregation in public recreational facilities that was prohibited in the parks decree and likewise condemned in *Watson* v. *Memphis*, 373 U. S. 526 (1963). See also *Dawson* v. *Mayor and City Council of Baltimore*, 220 F. 2d 386 (CA4), aff'd, 350 U. S. 877 (1955); *Muir* v. *Louisville Park Theatrical Assn.*, 347 U. S. 971 (1954); *Holmes* v. *City of Atlanta*, 350 U. S. 879 (1955); *New Orleans City Park Improvement Assn.* v. *Detiege*, 358 U. S. 54 (1958). For example, the record contains indications that there are all-white private and all-Negro public Dixie Youth and Babe Ruth baseball leagues for children, all of which use city-provided ballfields and lighting, balls, bats, mitts, and other aid. Were the District Court to determine that this dual system came about as a means of evading the parks decree, or of serving to perpetuate the separate-but-equal use of city facilities on the basis of race, through the aid and assistance of the city, further relief would be appropriate.

The problem of private group use is much more complex. The Court of Appeals relied on *Moose Lodge No. 107* v. *Irvis*, 407 U. S. 163 (1972), in concluding that the use of city facilities by private clubs did not reflect a "symbiotic relationship" between government and those groups so as to constitute state action. 473 F. 2d, at 838–839.

We feel that *Moose Lodge* is not fully applicable here. In that case, we generally followed the approach taken

in *Burton* v. *Wilmington Parking Authority, supra,* where it was stated:

> "Owing to the very 'largeness' of government, a multitude of relationships might appear to some to fall within the Amendment's embrace, but that, it must be remembered, can be determined only in the framework of the peculiar facts or circumstances present." 365 U. S., at 725–726.

In *Moose Lodge* the litigation was directly against a private organization, and it was alleged that the organization's racially discriminatory policies constituted state action. We held that there was no state action in the mere fact that the fraternal organization's beverage bar was licensed and regulated by the State. In contrast, here, as in *Burton,* the question of the existence of state action centers in the extent of the city's involvement in discriminatory actions by private agencies using public facilities, and in whether that involvement makes the city "a joint participant in the challenged activity, which, on that account, cannot be considered to have been so 'purely private' as to fall without the scope of the Fourteenth Amendment." 365 U. S., at 725. Because the city makes city property available for use by private entities, this case is more like *Burton* than *Moose Lodge.* The question then is whether there is significant state involvement in the private discrimination alleged. *Reitman* v. *Mulkey,* 387 U. S. 369 (1967); *Burton* v. *Wilmington Parking Authority, supra; Evans* v. *Newton,* 382 U. S. 296 (1966); *Moose Lodge No. 107* v. *Irvis, supra.* "The Court has never held, of course, that discrimination by an otherwise private entity would be violative of the Equal Protection Clause if the private entity receives any sort of benefit or service at all from the State, or if it is subject to state regulation in any degree whatever."

407 U. S., at 173. Traditional state monopolies, such as electricity, water, and police and fire protection—all generalized governmental services—do not by their mere provision constitute a showing of state involvement in invidious discrimination. *Norwood* v. *Harrison,* 413 U. S., at 465; *Moose Lodge No. 107* v. *Irvis,* 407 U. S., at 173. The same is true of a broad spectrum of municipal recreational facilities: parks, playgrounds, athletic facilities, amphitheaters, museums, zoos, and the like. Cf. *Evans* v. *Newton,* 382 U. S., at 302. It follows, therefore, that the portion of the District Court's order prohibiting the mere use of such facilities by *any* segregated "private group, club or organization" is invalid because it was not predicated upon a proper finding of state action.

If, however, the city or other governmental entity rations otherwise freely accessible recreational facilities, the case for state action will naturally be stronger than if the facilities are simply available to all comers without condition or reservation. Here, for example, petitioners allege that the city engages in scheduling softball games for an all-white church league and provides balls, equipment, fields, and lighting. The city's role in that situation would be dangerously close to what was found to exist in *Burton,* where the city had "elected to place its power, property and prestige behind the admitted discrimination." 365 U. S., at 725. We are reminded, however, that the Court has never attempted to formulate "an infallible test for determining whether the State . . . has become significantly involved in private discriminations" so as to constitute state action. *Reitman* v. *Mulkey,* 387 U. S., at 378. " 'Only by sifting facts and weighing circumstances' on a case-by-case basis can a 'nonobvious involvement of the State in private conduct be attributed its true significance.' " *Ibid.,* quoting *Burton,* 365 U. S., at 722. This is the task for the District Court on remand.

III

We close with this word of caution. It should be obvious that the exclusion of any person or group—all-Negro, all-Oriental, or all-white—from public facilities infringes upon the freedom of the individual to associate as he chooses. MR. JUSTICE DOUGLAS emphasized this in his dissent, joined by MR. JUSTICE MARSHALL, in *Moose Lodge*. He observed: "The associational rights which our system honors permit all white, all black, all brown, and all yellow clubs to be formed. They also permit all Catholic, all Jewish, or all agnostic clubs to be established. Government may not tell a man or woman who his or her associates must be. The individual can be as selective as he desires." 407 U. S., at 179–180. The freedom to associate applies to the beliefs we share, and to those we consider reprehensible. It tends to produce the diversity of opinion that oils the machinery of democratic government and insures peaceful, orderly change. Because its exercise is largely dependent on the right to own or use property, *Healy* v. *James*, 408 U. S. 169, 181–183 (1972), any denial of access to public facilities must withstand close scrutiny and be carefully circumscribed. Certainly, a person's mere membership in an organization which possesses a discriminatory admissions policy would not alone be ground for his exclusion from public facilities. Having said this, however, we must also be aware that the very exercise of the freedom to associate by some may serve to infringe that freedom for others. Invidious discrimination takes its own toll on the freedom to associate, and it is not subject to affirmative constitutional protection when it involves state action. *Norwood* v. *Harrison*, 413 U. S., at 470.

The judgment of the Court of Appeals is therefore reversed in part. The case is remanded to that court

with directions to remand it in turn to the District Court for further proceedings consistent with this opinion.

It is so ordered.

MR. JUSTICE MARSHALL, concurring in part and dissenting in part.

Although I am in general agreement with the views expressed in my Brother WHITE'S opinion, I wish to address certain other considerations which I believe should govern appellate review of the order entered by the District Court in this case. That court, which has an unfortunately longstanding and by now intimate familiarity with the problems presented in this case, issued the supplemental relief at issue here in response to a motion by petitioners bringing to its attention the practice of the city of Montgomery of allowing private schools and clubs with racially discriminatory admissions policies or with segregated memberships to use football facilities maintained at city expense. For all that appears in the record, this practice, and the related practice of allowing private segregated schools and clubs to use baseball fields, basketball courts, and athletic equipment maintained and purchased at city expense, were the only problems before the District Court and the only problems intended to be cured by its supplemental order.

Both the Court of Appeals and this Court, rather than limiting their review of the order in conformity with its intended scope, have sought to project the order to a wide variety of problems not before the District Court—including so-called nonexclusive access by private school groups or nonschool organizations to zoos, museums, parks, nature walks, and other similar municipal facilities—and to review the order as so projected.

By rendering an advisory opinion on matters never presented to the District Court, the Court of Appeals

and this Court have attempted to solve in the abstract problems which, in my view, should more appropriately be entrusted in large measure to the sound discretion of the District Court Judge who has lived with this case for so many years and who has a much better appreciation both of the extent to which these other matters are actual problems in the city of Montgomery and of the need for injunctive relief to resolve these problems to the extent they exist.

Since I find the District Court's order a permissible and appropriate remedy for the instances of unconstitutional state action brought to its attention, I would sustain and reinstate its order in its entirety.

MR. JUSTICE BRENNAN, concurring in the judgment.

The Court today affirms the Court of Appeals' judgment insofar as it affirmed paragraphs 1 and 2 of the District Court's order, *ante*, at 563–564, n. 6, as applied to enjoin respondents from permitting private segregated *school* groups to make "exclusive use" of Montgomery's recreational facilities. Unlike the Court, I do not think that remand is required for a determination whether certain "nonexclusive uses" by segregated *school* groups should also be proscribed, for I would also sustain paragraphs 1 and 2 insofar as they enjoin any school-sponsored or school-directed uses of the city recreational facilities that enable private segregated schools to duplicate public school operations at public expense.

Norwood v. *Harrison*, 413 U. S. 455 (1973), struck down a state program which loaned textbooks to students without regard to whether the students attended private schools with racially discriminatory policies. Finding that free textbooks, like tuition grants to private school students, were a "form of financial assistance inuring to the benefit of the private schools themselves," *id.*, at 464,

Norwood held that the State could not, consistent with the Equal Protection Clause, grant aid that had "a significant tendency to facilitate, reinforce, and support private discrimination." *Id.*, at 466. The reasoning of *Norwood* compels the conclusion that Montgomery must be enjoined from providing any assistance which financially benefits Montgomery's private segregated *schools*, except, of course, "such necessities of life as electricity, water, and police and fire protection," *Moose Lodge No. 107* v. *Irvis*, 407 U. S. 163, 173 (1972). The unconstitutionality is thus obvious of such "nonexclusive uses" of municipal recreational facilities as the use of a portion of a park for a segregated school's gym classes or organized athletic contests. By making its municipal facilities available to private segregated schools for such activities, Montgomery unconstitutionally subsidizes its private segregated schools by relieving them of the expense of maintaining their own facilities.

Whether it is necessary to go even further and enjoin all school-sponsored and school-directed nonexclusive uses of municipal recreational facilities—as would my Brothers WHITE and DOUGLAS—is a question I would have the District Judge decide on remand. Private segregated schools are not likely to maintain their own zoos, museums, or nature walks. Consequently, permitting segregated schools to take their students on field trips to city facilities of that kind would not result in a direct financial benefit to the schools themselves. An injunction against use by segregated schools of such city facilities would be appropriate, in my view, only if the District Court should find that the relief is necessary to insure full effectuation of the Montgomery desegregation decrees.

I agree with the Court's vacation of the Court of Appeals' judgment reversing paragraphs 3 and 4 of the District Court's order relating to segregated *nonschool* groups,

and with the direction to the Court of Appeals to enter a new judgment remanding the case to the District Court for further proceedings as to *nonschool* groups. A remand is required, in my view, because first the District Court must consider whether, for purposes of relief supplementary to the 1959 parks desegregation decree, a distinction between simply all-white groups and all-white groups with a segregated admissions policy is proper, *ante*, at 563–564, n. 6, and second, if that distinction is found meaningful, the District Court must clarify what evidence was relied upon to conclude that private organizations with racially discriminatory admissions policies are in fact using municipal facilities.*

*My examination of the record reveals: On December 1, 1971, the parties had filed an "Agreement for Submission of Case," reciting that they agreed "for the case to be submitted to the Court on the pleadings filed by the parties, the answers to interrogatories heretofore filed by the parties, the answers to interrogatories heretofore filed by the Defendants, and upon the Fact Stipulation as attached hereto." The only interrogatories propounded in connection with the "Motion for Further Relief," with which this action was commenced, were propounded to respondent Henry M. Andrews, Director of the Parks and Recreation Department, and neither his answers nor anything contained in the Fact Stipulation, addresses a practice of respondents with respect to the use of facilities by nonschool private clubs and groups. There is, however, testimony on that subject in the depositions of the several respondents taken in an earlier proceeding on the amended complaint that had led to a settlement agreement. Testimony as to the use of facilities by an allegedly private segregated citywide Dixie Youth baseball league appears in the depositions of Joseph E. Marshall and Durwood Lynn Bozeman, the City's Athletic Director. Mr. Marshall's deposition states that, while the Dixie Youth teams at one time were officially segregated, they removed racial restrictions a number of years ago "realizing that many of [the] Leagues used municipal facilities" and that invitations to join the leagues are issued to all children in the public schools, though all of the directors of the leagues are white. Mr. Bozeman's deposition testifies that the city supplies these leagues

But, should the District Court on remand find adequate evidence of use of the city's recreational facilities by private *nonschool* groups with segregated admissions policies, or find that the distinction between such groups and simply all-white groups is improper, I believe that the District Court must enjoin "exclusive use" of recreational facilities by such groups. The complete record compiled in this case establishes beyond question that, even after the parks desegregation order of September 9, 1959, respondents continued for over a decade to engage in an unconstitutional *de jure* policy of deliberate segregation of the city's recreational facilities. The Court's reasoning in affirming the Court of Appeals' injunction against "exclusive use" of municipal recreational facilities by private segregated *school* groups demonstrates this and bears repetition:

> "[T]he city's policy of allocating facilities to segregated private schools, in the context of the 1959 parks desegregation order and subsequent history, created, in effect, 'enclaves of segregation' and deprived petitioners of equal access to parks and recreational facilities. The city was under an affirmative constitutional duty to eliminate every 'custom, practice, policy or usage' reflecting an 'impermissible obeisance to the now thoroughly discredited doctrine of "separate but equal." '... This obviously meant that discriminatory practices in Montgomery parks and recreational facilities were to be eliminated 'root and branch,' to use the phrase employed in *Green* v.

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with playing facilities, pays for lighting, and gives each of them a dozen balls, chest protectors, leg guards, masks, mitts, and eight bats. Mr. Bozeman's deposition also covers the operations of the private, allegedly predominantly white, Babe Ruth league and a public Negro Babe Ruth league, and discusses the operations of allegedly segregated church softball leagues.

County School Board of New Kent County, 391 U. S. 430, 438 (1968)." *Ante*, at 566–567.

Surely, respondents' failure to extirpate "enclaves of segregation" created by "exclusive use" of city recreational facilities by private *nonschool* groups is no less a violation of the city's affirmative duty to desegregate the parks than its proved failure to eliminate "enclaves" created by the "exclusive use" of such facilities by *school* groups. Thus, unlike the Court, I see no reason for deferring an immediate expression on the significance of the city's involvement in the private discrimination of the nonschool groups, see *ante*, at 574, pending a more fully developed factual record. The justifications for finding that "exclusive use" by *school* groups violated the 1959 parks desegregation order plainly also require that, if private *nonschool* groups are in fact making "exclusive use" of municipal facilities, these uses, too, be found to violate the 1959 decree. In that circumstance, the unconstitutional "state action" of the respondents consists of their continuing racially discriminatory policies and practices that frustrate and impede the dismantlement of Montgomery's *de jure* segregated parks.

MR. JUSTICE WHITE, with whom MR. JUSTICE DOUGLAS joins, concurring in the judgment.

I concur in the Court's judgment except that I would sustain the District Court not only to the extent the Court of Appeals affirmed its judgment but also insofar as it would bar the use of city-owned recreation facilities by students from segregated schools for events or occasions that are part of the school curriculum or organized and arranged by the school as part of its own program. I see no difference of substance between this type of use and the exclusive use that the majority agrees may not be permitted consistent with the Equal Protection Clause.

It may be useful also to emphasize that there is very plainly state action of some sort involved in the leasing, rental, or extending the use of scarce city-owned recreation facilities to private schools or other private groups. The facilities belong to the city, an arm of the State; the decision to lease or otherwise permit the use of the facilities is deliberately made by the city; and it is fair to assume that those who enter into these transactions on behalf of the city know the nature of the use and the character of the group to whom use is being extended. For Fourteenth Amendment purposes, the question is not whether there is state action, but whether the conceded action by the city, and hence by the State, is such that the State must be deemed to have denied the equal protection of the laws. In other words, by permitting a segregated school or group to use city-owned facilities, has the State furnished such aid to the group's segregated policies or become so involved in them that the State itself may fairly be said to have denied equal protection? Under *Burton* v. *Wilmington Parking Authority*, 365 U. S. 715 (1961), it is perfectly clear that to violate the Equal Protection Clause the State itself need not make, advise, or authorize the private decision to discriminate that involves the State in the practice of segregation or would appear to do so in the minds of ordinary citizens.

Syllabus

CARDWELL, WARDEN *v.* LEWIS

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

No. 72–1603. Argued March 18, 1974—Decided June 17, 1974.

On July 24, 1967, law enforcement officers interviewed respondent in connection with a murder that had occurred five days before and viewed his automobile, which was thought to have been used in the commission of the crime. On October 10, in response to a previous request, respondent appeared at 10 a. m. for questioning at the office of the investigating authorities, having left his car at a nearby public commercial parking lot. Though the police had secured a warrant for respondent's arrest at 8 a. m., respondent was not arrested until late in the afternoon, after which his car was towed to a police impoundment lot, where a warrantless examination the next day of the outside of the car revealed that a tire matched the cast of a tire impression made at the crime scene and that paint samples taken from respondent's car were not different from foreign paint on the fender of the victim's car. Respondent was tried and convicted of the murder, and his conviction was affirmed on appeal. In a subsequent habeas corpus proceeding the District Court concluded that the seizure and examination of respondent's car violated the Fourth and Fourteenth Amendments and that the evidence obtained therefrom should have been excluded at the trial. The Court of Appeals affirmed, concluding that the scraping of paint from the car's exterior was a search within the meaning of the Fourth Amendment; that the search, which was not incident to respondent's arrest, was unconsented; and that the car's seizure could not be justified on the ground that the car was an instrumentality of the crime in plain view. *Held:* The judgment is reversed. Pp. 585–596.

476 F. 2d 467, reversed.

MR. JUSTICE BLACKMUN, joined by THE CHIEF JUSTICE, MR. JUSTICE WHITE, and MR. JUSTICE REHNQUIST, concluded that:

1. The examination of the exterior of respondent's automobile upon probable cause was reasonable and invaded no right of privacy that the requirement of a search warrant is meant to protect. Pp. 588–592.

(a) The primary object of the Fourth Amendment is the protection of privacy. *Warden* v. *Hayden*, 387 U. S. 294, 305–306. P. 589.

(b) Generally, less stringent warrant requirements are applied to vehicles than to homes or offices, *Carroll* v. *United States*, 267 U. S. 132; *Chambers* v. *Maroney*, 399 U. S. 42, and the search of a vehicle is less intrusive and implicates a lesser expectation of privacy. Pp. 589–591.

(c) The "search" in this case, concededly made on the basis of probable cause, infringed no expectation of privacy. Pp. 591–592.

2. Under the circumstances of this case the seizure by impounding the car was not unreasonable. Pp. 592–596.

(a) The vehicle was seized from a public place, where access was not meaningfully restricted. *Chambers* v. *Maroney*, *supra*, followed; *Coolidge* v. *New Hampshire*, 403 U. S. 443, distinguished. Pp. 593–595.

(b) Exigent circumstances justifying a warrantless search of a vehicle are not limited to situations where probable cause is unforeseeable and arises only at the time of arrest. Cf. *Chambers*, *supra*, at 50–51. Pp. 595–596.

MR. JUSTICE POWELL, being of the view that the inquiry of a federal court on habeas corpus review of a state prisoner's Fourth Amendment claim should be confined solely to the question whether the defendant had an opportunity in the state courts to raise that claim and have it adjudicated fairly, would reverse the judgment of the Court of Appeals since respondent does not contend that he was denied that opportunity. See *Schneckloth* v. *Bustamonte*, 412 U. S. 218, 250 (POWELL, J., concurring). P. 596.

BLACKMUN, J., announced the Court's judgment and delivered an opinion, in which BURGER, C. J., and WHITE and REHNQUIST, JJ., joined. Powell, J., filed an opinion concurring in the result, *post*, p. 596. STEWART, J., filed a dissenting opinion, in which DOUGLAS, BRENNAN, and MARSHALL, JJ., joined, *post*, p. 596.

Leo J. Conway, Assistant Attorney General of Ohio, argued the cause for petitioner. With him on the brief were *William J. Brown*, Attorney General, and *Nicholas R. Curci*, Assistant Attorney General.

Bruce A. Campbell, by appointment of the Court, 414

U. S. 1140, argued the cause and filed a brief for respondent.

Andrew L. Frey argued the cause for the United States as *amicus curiae* urging reversal. On the brief were *Solicitor General Bork, Assistant Attorney General Petersen,* and *Edward R. Korman.*

MR. JUSTICE BLACKMUN announced the judgment of the Court and an opinion in which the CHIEF JUSTICE, MR. JUSTICE WHITE, and MR. JUSTICE REHNQUIST join.

This case presents the issue of the legality, under the Fourth and Fourteenth Amendments, of a warrantless seizure of an automobile and the examination of its exterior at a police impoundment area after the car had been removed from a public parking lot.

Evidence obtained upon this examination was introduced at the respondent's state court trial for first-degree murder. He was convicted. The Federal District Court, on a habeas corpus application, ruled that the examination was a search violative of the Fourth and Fourteenth Amendments. 354 F. Supp. 26 (SD Ohio 1972). The United States Court of Appeals for the Sixth Circuit affirmed. 476 F. 2d 467 (1973). We granted certiorari, 414 U. S. 1062 (1973), and now conclude that, under the circumstances of this case, there was no violation of the protection afforded by the Amendments.

I

In 1968 respondent Arthur Ben Lewis, Jr., was tried and convicted by a jury in an Ohio state court for the first-degree murder of Paul Radcliffe. On appeal, the Supreme Court of Ohio affirmed the judgment of conviction. *State* v. *Lewis,* 22 Ohio St. 2d 125, 258 N. E. 2d 445 (1970). This Court denied review. *Lewis* v. *Ohio,* 400 U. S. 959 (1970).

On respondent's federal habeas application, the District Court, from the record and after an evidentiary hearing, adduced the following facts:

On the afternoon of July 19, 1967, Radcliffe's body was found near his car on the banks of the Olentangy River in Delaware County, Ohio. The car had gone over the embankment and had come to rest in brush. Radcliffe had died from shotgun wounds. Casts were made of tire tracks at the scene, and foreign paint scrapings were removed from the right rear fender of Radcliffe's automobile.

Within five days of Radcliffe's death, the investigation began to focus upon respondent Lewis. It was learned that Lewis knew Radcliffe. Lewis had been negotiating the sale of a business and had executed a contract of sale. The purchaser, Jack Smith, employed Radcliffe,. an accountant, to examine Lewis' books. Police went to Lewis' place of business to question him and there observed the model and color of his car in the thought that it might have been used to push the Radcliffe vehicle over the embankment. Not until several months later, however, in late September, was Lewis again questioned. On October 9, he was asked to appear the next morning at the Office of the Division of Criminal Activities in Columbus for further interrogation.

On October 10, at 8 a. m., a warrant for respondent's arrest was obtained.[1] The District Court found that at

[1] The arrest warrant was obtained in Delaware County, where the crime was committed. The Activities Office is in adjacent Franklin County. In Ohio, an arrest warrant may be served in any county of the State. Ohio Rev. Code Ann. § 2941.36 (1953). In contrast, a search warrant in Ohio may be issued by a judge or magistrate only "within his jurisdiction." Ohio Rev. Code Ann. § 2933.21 (Supp. 1972). Thus, a search warrant obtained in Delaware County is not valid in Franklin County.

this time, in addition to probable cause for the arrest, the police also had probable cause to believe that Lewis' car was used in the commission of the crime. An automobile similar to his had been observed leaving the scene; the color of his vehicle was similar to the color of the paint scrapings from the victim's car; in a telephone call to Mrs. Smith, made by a person who said he was Radcliffe, but proved not to be,[2] the caller made statements that, if true, would benefit only Lewis; he had had body repair work done on the grille, hood, right front fender, and other parts of his car on the day following the crime; and the victim's desk calendar for the day of his death showed the notation, "Call Ben Lewis."[3]

Respondent Lewis complied with the request to appear. He drove his car to the Activities Office, placed it in a public commercial parking lot a half block away, and arrived shortly after 10 a. m. Although the police were in possession of the arrest warrant for the entire period that Lewis was present, he was not served with that warrant or arrested until late that afternoon, at approximately 5 p. m. Two hours earlier, Lewis had been permitted to call his lawyer, and two attorneys were present on his behalf in the office at the time of the formal arrest. Upon the arrest, Lewis' car keys and the parking lot claim check were released to the police. A tow truck

[2] The call was made at about 9:30 a. m. on July 19 by a man who identified himself to Mrs. Smith as Radcliffe and who stated that the books were in "A–1 condition." Mrs. Smith, who knew the victim, did not identify the caller as Radcliffe. Gunshots were heard between 8 a. m. and 8:30 a. m. that day by two women who lived near the site of the crime. It thus became clear that someone had impersonated Radcliffe in making the telephone call.

[3] The calendar's page for July 19 was missing. Investigation disclosed a writing indentation, on the next and underlying page for July 20, which indicated what had been written on the page for July 19.

was dispatched to remove the car from the parking lot to the police impoundment lot.

The impounded car was examined the next day by a technician from the Ohio Bureau of Criminal Investigation. The tread of its right rear tire was found to match the cast of a tire impression made at the scene of the crime.[4] The technician testified that, in his opinion, the foreign paint on the fender of Radcliffe's car was not different from the paint samples taken from respondent's vehicle, that is, there was no difference in color, texture, or order of layering of the paint.

The District Court concluded that the seizure and examination of Lewis' car were violative of the Fourth and Fourteenth Amendments, and that the evidence obtained therefrom should have been excluded at the state court trial. The court, accordingly, issued a writ of habeas corpus requiring the State to "initiate action for a new trial of" respondent within 90 days or, in the alternative, to release him. 354 F. Supp., at 44. The Court of Appeals, in affirming, held that the scraping of paint from the exterior of Lewis' car was in fact a search, within the meaning of the Fourth Amendment; that there was no consent to that search; that it was not incident to Lewis' arrest; and that the seizure of the car could not be justified on the ground that the vehicle was an instrumentality of the crime in plain view.

II

This case is factually different from prior car search cases decided by this Court. The evidence with which we are concerned is not the product of a "search" that im-

[4] Apparently, the car's trunk was also opened and a tire in the trunk was observed. 354 F. Supp. 26, 33; 476 F. 2d 467, 468. No evidence obtained from any part of the interior of the vehicle, however, was introduced.

plicates traditional considerations of the owner's privacy interest. It consisted of paint scrapings from the *exterior* and an observation of the tread of a tire on an operative wheel. The issue, therefore, is whether the examination of an automobile's exterior upon probable cause invades a right to privacy which the interposition of a warrant requirement is meant to protect. This is an issue this Court has not previously addressed.

The common-law notion that a warrant to search and seize is dependent upon the assertion of a superior government interest in property, see, *e. g., Entick* v. *Carrington,* 19 How. St. Tr. 1029, 1066 (1765), and the proposition that a warrant is valid "only when a primary right to such search and seizure may be found in the interest which the public or the complainant may have in the property to be seized, or in the right to the possession of it," *Gouled* v. *United States,* 255 U. S. 298, 309 (1921), were explicitly rejected as controlling Fourth Amendment considerations in *Warden* v. *Hayden,* 387 U. S. 294, 302–306 (1967). Rather than property rights, the primary object of the Fourth Amendment was determined to be the protection of privacy. *Id.,* at 305–306. And it had been said earlier: "The decisions of this Court have time and again underscored the essential purpose of the Fourth Amendment to shield the citizen from unwarranted intrusions into his privacy." *Jones* v. *United States,* 357 U. S. 493, 498 (1958). See also *Schmerber* v. *California,* 384 U. S. 757, 769–770 (1966); *Katz* v. *United States,* 389 U. S. 347, 350 (1967); *United States* v. *Dionisio,* 410 U. S. 1, 14–15 (1973).

At least since *Carroll* v. *United States,* 267 U. S. 132 (1925), the Court has recognized a distinction between the warrantless search and seizure of automobiles or other movable vehicles, on the one hand, and the search of a home or office, on the other. Generally, less strin-

gent warrant requirements have been applied to vehicles. In *Chambers* v. *Maroney*, 399 U. S. 42, 49 (1970), the Court chronicled the development of car searches and seizures.[5] An underlying factor in the *Carroll-Chambers* line of decisions has been the exigent circumstances that exist in connection with movable vehicles. "[T]he circumstances that furnish probable cause to search a particular auto for particular articles are most often unforeseeable; moreover, the opportunity to search is fleeting since a car is readily movable." *Chambers* v. *Maroney*, 399 U. S., at 50–51. This is strikingly true where the automobile's owner is alerted to police intentions and, as a consequence, the motivation to remove evidence from official grasp is heightened.

There is still another distinguishing factor. "The search of an automobile is far less intrusive on the rights protected by the Fourth Amendment than the search of one's person or of a building." *Almeida-Sanchez* v. *United States*, 413 U. S. 266, 279 (1973) (POWELL, J., concurring). One has a lesser expectation of privacy in a motor vehicle because its function is transportation and it seldom serves as one's residence or as the repository of personal effects. A car has little capacity for escaping public scrutiny. It travels public thoroughfares where both its occupants and its contents are in plain view. See *People* v. *Case*, 220 Mich. 379, 388–

[5] The Court there discussed the following post-*Carroll* cases: *Husty* v. *United States*, 282 U. S. 694 (1931); *Scher* v. *United States*, 305 U. S. 251 (1938); *Brinegar* v. *United States*, 338 U. S. 160 (1949); *Preston* v. *United States*, 376 U. S. 364 (1964); *Cooper* v. *California*, 386 U. S. 58 (1967); *Dyke* v. *Taylor Implement Mfg. Co.*, 391 U. S. 216 (1968). Cases decided since *Chambers* and that now might be added to the list include *Coolidge* v. *New Hampshire*, 403 U. S. 443 (1971); *Almeida-Sanchez* v. *United States*, 413 U. S. 266 (1973); *Cady* v. *Dombrowski*, 413 U. S. 433 (1973). See also *Harris* v. *United States*, 390 U. S. 234 (1968); Note, Warrantless Searches and Seizures of Automobiles, 87 Harv. L. Rev. 835 (1974).

389, 190 N. W. 289, 292 (1922). "What a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protection." *Katz* v. *United States*, 389 U. S., at 351; *United States* v. *Dionisio*, 410 U. S., at 14. This is not to say that no part of the interior of an automobile has Fourth Amendment protection; the exercise of a desire to be mobile does not, of course, waive one's right to be free of unreasonable government intrusion. But insofar as Fourth Amendment protection extends to a motor vehicle, it is the right to privacy that is the touchstone of our inquiry.

In the present case, nothing from the interior of the car and no personal effects, which the Fourth Amendment traditionally has been deemed to protect, were searched or seized and introduced in evidence.[6] With the "search" limited to the examination of the tire on the wheel and the taking of paint scrapings from the exterior of the vehicle left in the public parking lot, we fail to comprehend what expectation of privacy was infringed.[7] Stated

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[6] Petitioner contends that Lewis' car keys and the parking lot claim check were seized in plain view as an incident to his arrest, and that this seizure served to transfer constructive possession of the vehicle which could then be searched and seized as an instrumentality of the crime. We feel that the District Court and the Court of Appeals were correct in rejecting this argument. Irrespective of the plain-view or instrumentality analyses, the concept of constructive possession has not been found to justify the search or seizure of an item not in actual possession.

[7] As has been noted, the arrest was made at the Office of the Division of Criminal Activities; but the examination of the vehicle took place some time later at the police impoundment lot. This difference in time and place eliminates any search-incident-to-an-arrest contention.

"The rule allowing contemporaneous searches is justified, for example, by the need to seize weapons and other things which might be used to assault an officer or effect an escape, as well as by the

simply, the invasion of privacy, "if it can be said to exist, is abstract and theoretical." *Air Pollution Variance Board* v. *Western Alfalfa Corp.*, 416 U. S. 861, 865 (1974). Under circumstances such as these, where probable cause exists, a warrantless examination of the exterior of a car is not unreasonable under the Fourth and Fourteenth Amendments.[8]

Here, it has been established and is conceded that the police had probable cause to search Lewis' car. An automobile similar in color and model to his car had been seen leaving the scene of the crime. This similarity was corroborated by comparison of the paint scrapings taken from the victim's car with the color and paint of Lewis' automobile. Lewis had had repair work done on his car immediately following the death of the victim. And he had a nexus with Radcliffe on the day of death. All this provided reason to believe that the car was used in the commission of the crime for which Lewis was arrested. *Cooper* v. *California*, 386 U. S. 58, 61 (1967).

III

Concluding, as we have, that the examination of the exterior of the vehicle upon probable cause was reason-

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need to prevent the destruction of evidence of the crime—things which might easily happen where the weapon or evidence is on the accused's person or under his immediate control. But these justifications are absent where a search is remote in time or place from the arrest. Once an accused is under arrest and in custody, then a search made at another place, without a warrant, is simply not incident to the arrest." *Preston* v. *United States*, 376 U. S. 364, 367 (1964). See also *Chambers* v. *Maroney*, 399 U. S. 42, 47 (1970).

[8] Again, we are not confronted with any issue as to the propriety of a search of a car's interior. "Neither *Carroll, supra,* nor other cases in this Court require or suggest that in every conceivable circumstance the search of an auto even with probable cause may be made without the extra protection for privacy that a warrant affords." *Id.*, at 50.

able, we have yet to determine whether the prior impoundment of the automobile rendered that examination a violation of the Fourth and Fourteenth Amendments. We do not think that, because the police impounded the car prior to the examination, which they could have made on the spot, there is a constitutional barrier to the use of the evidence obtained thereby. Under the circumstances of this case, the seizure itself was not unreasonable.

Respondent asserts that this case is indistinguishable from *Coolidge* v. *New Hampshire*, 403 U. S. 443 (1971). We do not agree. The present case differs from *Coolidge* both in the scope of the search [9] and in the circumstances of the seizure. Since the Coolidge car was parked on the defendant's driveway, the seizure of that automobile required an entry upon private property. Here, as in *Chambers* v. *Maroney*, 399 U. S. 42 (1970), the automobile was seized from a public place where access was not meaningfully restricted. This is, in fact, the ground upon which the *Coolidge* plurality opinion distinguished *Chambers*, 403 U. S., at 463 n. 20. See also *Cady* v. *Dombrowski*, 413 U. S. 433, 446–447 (1973).

In considering whether the lack of a warrant to seize a vehicle invalidates the otherwise legal examination of the car, *Chambers* is highly pertinent. In *Chambers*, four men in an automobile were arrested shortly after an armed robbery. The Court concluded that there was probable cause to arrest and probable cause to search the vehicle. The car was taken from the highway to

[9] *Coolidge* concerned a thorough and extensive search of the entire automobile including the interior from which, by vacuum sweepings, incriminating evidence was obtained. A search of that kind raises different and additional considerations not present in the examination of a tire on an operative wheel and in the taking of exterior paint samples from the vehicle in the present case for which there was no reasonable expectation of privacy.

the police station where, some time later, a search producing incriminating evidence, was conducted. We stated:

> "For constitutional purposes, we see no difference between on the one hand seizing and holding a car before presenting the probable cause issue to a magistrate and on the other hand carrying out an immediate search without a warrant. Given probable cause to search, either course is reasonable under the Fourth Amendment.
>
> ". . . The probable-cause factor still obtained at the station house and so did the mobility of the car unless the Fourth Amendment permits a warrantless seizure of the car and the denial of its use to anyone until a warrant is secured. In that event there is little to choose in terms of practical consequences between an immediate search without a warrant and the car's immobilization until a warrant is obtained." 399 U. S., at 52.

The fact that the car in *Chambers* was seized after being stopped on a highway, whereas Lewis' car was seized from a public parking lot, has little, if any, legal significance.[10] The same arguments and considerations of exigency, immobilization on the spot, and posting a

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[10] Before the District Court, the State argued that Lewis had consented to the seizure of his car by requesting that the police impound it for safekeeping. The District Court stated:

"Viewing the evidence in the light most favorable to the State, petitioner [Lewis] did not clearly and unequivocally consent to the seizure and search of the automobile. The testimony . . . established, at most, that petitioner consented to their taking custody of the car for safekeeping. There is no evidence that petitioner consented, expressly or impliedly, to a seizure of the automobile for purposes of a search. . . ." 354 F. Supp., at 37–38.

Inasmuch as we hold the seizure to be justified under *Chambers*, we do not reach the issue of Lewis' consent.

guard obtain. In fact, because the interrogation session ended with awareness that Lewis had been arrested and that his car constituted incriminating evidence, the incentive and potential for the car's removal substantially increased. There was testimony at the federal hearing that Lewis asked one of his attorneys to see that his wife and family got the car, and that the attorney relinquished the keys to the police in order to avoid a physical confrontation. 354 F. Supp., at 33. In *Chambers*, all occupants of the car were in custody and there were no means of relating this fact or the location of the car (if it had not been impounded) to a friend or confederate. *Chambers* also stated that a search of the car on the spot was impractical because it was dark and the search could not be carefully executed. 399 U. S., at 52 n. 10. Here too, the seizure facilitated the type of close examination necessary.[11]

Respondent contends that here, unlike *Chambers*, probable cause to search the car existed for some time prior to arrest and that, therefore, there were no exigent circumstances. Assuming that probable cause previously existed, we know of no case or principle that suggests that the right to search on probable cause and the reasonableness of seizing a car under exigent circumstances are foreclosed if a warrant was not obtained at the first practicable moment. Exigent circumstances with regard to vehicles are not limited to situations where probable cause is unforeseeable and arises only at the time of arrest. Cf. *Chambers, id.*, at 50–51. The exigency may arise at any time, and the fact that the police might have ob-

[11] To make a comparison with a paint scraping required that a section of the painted exterior that had not been recently repaired be sampled. This conceivably could necessitate several scrapings if the first sample was not conclusive after laboratory analysis. Similarly, to make a cast of the tire tread on the operative wheel would require laboratory equipment.

tained a warrant earlier does not negate the possibility of a current situation's necessitating prompt police action.[12]

The judgment of the Court of Appeals is reversed.

It is so ordered.

MR. JUSTICE POWELL, concurring in the result.

I would reverse the judgment of the Court of Appeals for the reasons set forth in my concurring opinion in *Schneckloth* v. *Bustamonte*, 412 U. S. 218, 250 (1973). As stated therein, I would hold that "federal collateral review of a state prisoner's Fourth Amendment claims—claims which rarely bear on innocence—should be confined solely to the question of whether the petitioner [for habeas corpus] was provided a fair opportunity to raise and have adjudicated the question in state courts." *Ibid.* In this case there is no contention that respondent was denied a full and fair opportunity to litigate his claim in the state courts.

MR. JUSTICE STEWART, with whom MR. JUSTICE DOUGLAS, MR. JUSTICE BRENNAN, and MR. JUSTICE MARSHALL join, dissenting.

The most fundamental rule in this area of constitutional law is that "searches conducted outside the judicial process, without prior approval by judge or magistrate, are *per se* unreasonable under the Fourth Amendment—subject only to a few specifically established and well-delineated exceptions." *Katz* v. *United States*, 389 U. S. 347, 357; *Coolidge* v. *New Hampshire*, 403 U. S. 443, 454–455. See also *Camara* v. *Municipal Court*, 387 U. S. 523, 528–529. Since there was no warrant authorizing

[12] We do not address the question found to be determinative in MR. JUSTICE POWELL's opinion concurring in the result. This question was not raised or briefed by the parties.

the search and seizure in this case, and since none of the "specifically established and well-delineated exceptions" to the warrant requirement here existed, I am convinced the judgment of the Court of Appeals must be affirmed.[1]

In casting about for some way to avoid the impact of our previous decisions, the plurality opinion first suggests, *ante,* at 588–589, that no "search" really took place in this case, since all that the police did was to scrape paint from the respondent's car and make observations of its tires. Whatever merit this argument might possess in the abstract, it is irrelevant in the circumstances disclosed by this record. The argument is irrelevant for the simple reason that the police, before taking the paint scrapings and looking at the tires, first took possession of the car itself. The Fourth and Fourteenth Amendments protect against "unreasonable searches and *seizures,*" and there most assuredly was a seizure here.

The plurality opinion next seems to suggest that the basic constitutional rule can be overlooked in this case because the subject of the seizure was an automobile. It is true, of course, that a line of decisions, beginning with *Carroll* v. *United States,* 267 U. S. 132, have recognized a so-called "automobile exception" to the constitutional requirement of a warrant. But "[t]he word 'automobile' is not a talisman in whose presence the Fourth Amendment fades away and disappears." *Coolidge, supra,* at 461–462. Rather, the *Carroll* doctrine simply recognizes the obvious—that a *moving* automobile on the open road presents a situation "where it is not practicable to secure a warrant because the vehicle can be quickly moved out of the locality or jurisdiction in which the

[1] This dissent is directed toward the search-and-seizure analysis in MR. JUSTICE BLACKMUN's plurality opinion. Like the plurality, I do not consider the issue raised by MR. JUSTICE POWELL's concurrence, it having been neither briefed nor argued by the parties.

warrant must be sought." *Carroll, supra,* at 153. See also *Almeida-Sanchez* v. *United States,* 413 U. S. 266, 269. Where there is no reasonable likelihood that the automobile would or could be moved, the *Carroll* doctrine is simply inapplicable. See, *e. g., Coolidge, supra; Preston* v. *United States,* 376 U. S. 364.

The facts of this case make clear beyond peradventure that the "automobile exception" is not available to uphold the warrantless seizure of the respondent's car. Well before the time that the automobile was seized, the respondent—and the keys to his car—were securely within police custody. There was thus absolutely no likelihood that the respondent could have either moved the car or meddled with it during the time necessary to obtain a search warrant. And there was no realistic possibility that anyone else was in a position to do so either. I am at a loss, therefore, to understand the plurality opinion's conclusion, *ante,* at 595, that there was a "potential for the car's removal" during the period immediately preceding the car's seizure. The facts of record can only support a diametrically opposite conclusion.

Finally, the plurality opinion suggests that other "exigent circumstances" might have excused the failure of the police to procure a warrant. The opinion nowhere states what these mystical exigencies might have been, and counsel for the petitioner has not been so inventive as to suggest any.[2] Since the authorities had taken care to procure an arrest warrant even before the respondent

[2] Even the Solicitor General, who appeared as *amicus curiae* urging a reversal of the Court of Appeals' judgment in this case, has candidly admitted in his brief that "no satisfactory reason appears for the failure of the law enforcement officers to have obtained a warrant—there appears on the facts of this case to have been no real likelihood that respondent would have destroyed or concealed the evidence sought during the time required to seek and procure a warrant." Brief for United States as *Amicus Curiae* 4–5.

arrived for questioning, it can scarcely be said that probable cause was not discovered until so late a point in time as to prevent the obtaining of a warrant for seizure of the automobile. And, with the automobile effectively immobilized during the period of the respondent's interrogation, the fear that evidence might be destroyed was hardly an exigency, particularly when it is remembered that no such fear prompted a seizure during all the preceding months while the respondent, though under investigation, had been in full control of the car.[3] This is, quite simply, a case where no exigent circumstances existed.[4]

Until today it has been clear that "[n]either *Carroll* . . . nor other cases in this Court require or suggest that in every conceivable circumstance the search of an auto even with probable cause may be made without the extra protection for privacy that a warrant affords." *Chambers* v. *Maroney*, 399 U. S. 42, 50. I would follow the settled constitutional law established in our decisions and affirm the judgment of the Court of Appeals.

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[3] It can hardly be argued that the questioning of the respondent by the police for the first time alerted him to their intentions, thus suddenly providing him a motivation to remove the car from "official grasp." *Ante*, at 590, 595. Even putting to one side the question of how the respondent could have acted to destroy any evidence while he was in police custody, the fact is that he was fully aware of official suspicion during several months preceding the interrogation. He had been questioned on several occasions prior to his arrest, and he had been alerted on the day before the interrogation that the police wished to see him. Nonetheless, he voluntarily drove his car to Columbus to keep his appointment with the investigators.

[4] The plurality opinion correctly rejects, *ante*, at 591–592, n. 7, the petitioner's contention that the seizure here was incident to the arrest of the respondent. "Once an accused is under arrest and in custody, then a search made at another place, without a warrant, is simply not incident to the arrest." *Preston* v. *United States*, 376 U. S. 364, 367.

Syllabus 417 U.S.

ROSS ET AL. *v.* MOFFITT

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

No. 73-786. Argued April 22, 1974—Decided June 17, 1974

Respondent, an indigent, while represented by court-appointed counsel, was convicted of forgery in state court in two separate cases, and his convictions were affirmed on his appeals of right by the North Carolina Court of Appeals. In one case he was denied appointment of counsel for discretionary review by the North Carolina Supreme Court, and in the other case, after that court had denied certiorari, was denied appointment of counsel to prepare a petition for certiorari to this Court. Subsequently, Federal District Courts denied habeas corpus relief, but the United States Court of Appeals reversed, holding that respondent was entitled to appointment of counsel both on his petition for review by the State Supreme Court and on his petition for certiorari in this Court. *Held:*

1. The Due Process Clause of the Fourteenth Amendment does not require North Carolina to provide respondent with counsel on his discretionary appeal to the State Supreme Court. Pp. 609–611.

(a) As contrasted with the trial stage of a criminal proceeding, a defendant appealing a conviction needs an attorney, not as a shield to protect him against being "haled into court" by the State and stripped of his presumption of innocence, but rather as a sword to upset the prior determination of guilt, the difference being significant since, while a State may not dispense with the trial stage without the defendant's consent, it need not provide any appeal at all. Pp. 610–611.

(b) The fact that an appeal has been provided does not automatically mean that the State then acts unfairly by refusing to provide counsel to indigent defendants at every stage of the way, but unfairness results only if the State singles out indigents and denies them meaningful access to the appellate system because of their poverty. P. 611.

2. Nor does the Equal Protection Clause of the Fourteenth Amendment require North Carolina to provide free counsel for indigent defendants seeking discretionary appeals to the State Supreme Court. Pp. 611–616.

(a) A defendant in respondent's circumstances is not denied meaningful access to the State Supreme Court simply because the State does not appoint counsel to aid him in seeking review in that court, since at that stage, under North Carolina's multi-tiered appellate system, he will have, at the very least, a transcript or other record of the trial proceedings, a brief in the Court of Appeals setting forth his claims of error, and frequently an opinion by that court disposing of his case, materials which, when supplemented by any *pro se* submission that might be made, would provide the Supreme Court with an adequate basis for its decision to grant or deny review under its standards of whether the case has "significant public interest," involves "legal principles of major significance," or likely conflicts with a previous Supreme Court decision. Pp. 614–615.

(b) Both an indigent defendant's opportunity to have counsel prepare an initial brief in the Court of Appeals and the nature of the Supreme Court's discretionary review make the relative handicap that such a defendant may have in comparison to a wealthy defendant, who has counsel at every stage of the proceeding, far less than the handicap borne by an indigent defendant denied counsel on his initial appeal of right, *Douglas* v. *California*, 372 U. S. 353. P. 616.

(c) That a particular service might benefit an indigent defendant does not mean that the service is constitutionally required, the duty of the State not being to duplicate the legal arsenal that may be privately retained by a criminal defendant in a continuing effort to reverse his conviction, but only to assure the indigent defendant, as was done here, an adequate opportunity to present his claims fairly in the context of the State's appellate process. P. 616.

3. Similarly, the Fourteenth Amendment does not require North Carolina to provide counsel for a convicted indigent defendant seeking to file a petition for certiorari in this Court, under circumstances where the State will have provided counsel for his only appeal as of right, and the brief prepared by such counsel together with one and perhaps two state appellate opinions will be available to this Court in order to decide whether to grant certiorari. Pp. 616–618.

(a) Since the right to seek discretionary review in this Court is conferred by federal statutes and not by any State, the argument that the State having once created a right of appeal must give all persons an equal opportunity to enjoy the right, is by

its terms inapplicable. *Griffin* v. *Illinois*, 351 U. S. 12, and *Douglas* v. *California*, *supra*, distinguished. P. 617.

(b) The suggestion that a State is responsible for providing counsel to an indigent defendant petitioning this Court simply because it initiated the prosecution leading to the judgment sought to be reviewed is unsupported by either reason or authority. Pp. 617–618.

483 F. 2d 650, reversed.

REHNQUIST, J., delivered the opinion of the Court, in which BURGER, C. J., and STEWART, WHITE, BLACKMUN, and POWELL, JJ., joined. DOUGLAS, J., filed a dissenting opinion, in which BRENNAN and MARSHALL, JJ., joined, *post*, p. 619.

Jacob L. Safron, Assistant Attorney General of North Carolina, argued the cause for petitioners. With him on the brief was *Robert Morgan*, Attorney General.

Thomas B. Anderson, Jr., by appointment of the Court, 415 U. S. 909, argued the cause and filed a brief for respondent.*

MR. JUSTICE REHNQUIST delivered the opinion of the Court.

We are asked in this case to decide whether *Douglas* v. *California*, 372 U. S. 353 (1963), which requires appointment of counsel for indigent state defendants on their first appeal as of right, should be extended to require counsel for discretionary state appeals and for applica-

*Briefs of *amici curiae* urging reversal were filed by *Robert L. Shevin*, Attorney General, and *Enoch J. Whitney*, Assistant Attorney General, for the State of Florida; by *William J. Scott*, Attorney General, and *James B. Zagel*, Assistant Attorney General, for the State of Illinois; and by *Andrew P. Miller*, Attorney General, and *Robert E. Shepherd, Jr.*, Assistant Attorney General, for the Commonwealth of Virginia.

Marshall J. Hartman and *James F. Flug* filed a brief for the National Legal Aid and Defender Assn. as *amicus curiae* urging affirmance.

tions for review in this Court. The Court of Appeals for the Fourth Circuit held that such appointment was required by the Due Process and Equal Protection Clauses of the Fourteenth Amendment.[1]

I

The case now before us has resulted from consolidation of two separate cases, North Carolina criminal prosecutions brought in the respective Superior Courts for the counties of Mecklenburg and Guilford. In both cases respondent pleaded not guilty to charges of forgery and uttering a forged instrument, and because of his indigency was represented at trial by court-appointed counsel. He was convicted and then took separate appeals to the North Carolina Court of Appeals, where he was again represented by court-appointed counsel, and his convictions were affirmed.[2] At this point the procedural histories of the two cases diverge.

Following affirmance of his Mecklenburg County conviction, respondent sought to invoke the discretionary review procedures of the North Carolina Supreme Court. His court-appointed counsel approached the Mecklenburg County Superior Court about possible appointment to represent respondent on this appeal, but counsel was informed that the State was not required to furnish counsel for that petition. Respondent sought collateral relief in both the state and federal courts, first raising his right-to-counsel contention in a habeas corpus petition filed in the United States District Court for the Western District of North Carolina in February 1971. Relief was denied at that time, and respondent's appeal to the Court

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[1] 483 F. 2d 650 (1973).

[2] *State* v. *Moffitt*, 9 N. C. App. 694, 177 S. E. 2d 324 (1970) (Mecklenburg); *State* v. *Moffitt*, 11 N. C. App. 337, 181 S. E. 2d 184 (1971) (Guilford).

of Appeals for the Fourth Circuit was dismissed by stipulation in order to allow respondent to first exhaust state remedies on this issue. After exhausting state remedies, he reapplied for habeas relief, which was again denied. Respondent appealed that denial to the Court of Appeals for the Fourth Circuit.

Following affirmance of his conviction on the Guilford County charges, respondent also sought discretionary review in the North Carolina Supreme Court. On this appeal, however, respondent was not denied counsel but rather was represented by the public defender who had been appointed for the trial and respondent's first appeal. The North Carolina Supreme Court denied certiorari.[3] Respondent then unsuccessfully petitioned the Superior Court for Guilford County for court-appointed counsel to prepare a petition for a writ of certiorari to this Court, and also sought post-conviction relief throughout the state courts. After these motions were denied, respondent again sought federal habeas relief, this time in the United States District Court for the Middle District of North Carolina. That court denied relief, and respondent took an appeal to the Court of Appeals for the Fourth Circuit.

The Court of Appeals reversed the two District Court judgments, holding that respondent was entitled to the assistance of counsel at state expense both on his petition for review in the North Carolina Supreme Court and on his petition for certiorari to this Court. Reviewing the procedures of the North Carolina appellate system and the possible benefits that counsel would provide for indigents seeking review in that system, the court stated:

> "As long as the state provides such procedures and allows other convicted felons to seek access to the

[3] *State* v. *Moffitt*, 279 N. C. 396, 183 S. E. 2d 247 (1971).

> higher court with the help of retained counsel, there is a marked absence of fairness in denying an indigent the assistance of counsel as he seeks access to the same court." [4]

This principle was held equally applicable to petitions for certiorari to this Court. For, said the Court of Appeals, "[t]he same concepts of fairness and equality, which require counsel in a first appeal of right, require counsel in other and subsequent discretionary appeals." [5]

We granted certiorari, 414 U. S. 1128, to consider the Court of Appeals' decision in light of *Douglas* v. *California,* and apparently conflicting decisions of the Courts of Appeals for the Seventh and Tenth Circuits.[6] For the reasons hereafter stated we reverse the Court of Appeals.

II

This Court, in the past 20 years, has given extensive consideration to the rights of indigent persons on appeal. In *Griffin* v. *Illinois,* 351 U. S. 12 (1956), the first of the pertinent cases, the Court had before it an Illinois rule allowing a convicted criminal defendant to present claims of trial error to the Supreme Court of Illinois only if he procured a transcript of the testimony adduced at his trial.[7] No exception was made for the indigent

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[4] 483 F. 2d, at 654.

[5] *Id.,* at 655. The court then decided to remand the case to the District Court to "appraise the substantiality of the federal claim." The court noted that it had no opportunity to examine the papers filed in the State Supreme Court and said that "[i]n the circumstances of this case . . . , where the only remedy available to the District Court would be the prisoner's release on a writ of habeas corpus," it was appropriate for the District Court to determine whether respondent's claim was "patently frivolous." *Ibid.*

[6] See *United States ex rel. Pennington* v. *Pate,* 409 F. 2d 757 (CA7 1969); *Peters* v. *Cox,* 341 F. 2d 575 (CA10 1965).

[7] See 351 U. S., at 13 n. 2.

defendant, and thus one who was unable to pay the cost of obtaining such a transcript was precluded from obtaining appellate review of asserted trial error. Mr. Justice Frankfurter, who cast the deciding vote, said in his concurring opinion:

> ". . . Illinois has decreed that only defendants who can afford to pay for the stenographic minutes of a trial may have trial errors reviewed on appeal by the Illinois Supreme Court." *Id.*, at 22.

The Court in *Griffin* held that this discrimination violated the Fourteenth Amendment.

Succeeding cases invalidated similar financial barriers to the appellate process, at the same time reaffirming the traditional principle that a State is not obliged to provide any appeal at all for criminal defendants. *McKane* v. *Durston,* 153 U. S. 684 (1894). The cases encompassed a variety of circumstances but all had a common theme. For example, *Lane* v. *Brown,* 372 U. S. 477 (1963), involved an Indiana provision declaring that only a public defender could obtain a free transcript of a hearing on a *coram nobis* application. If the public defender declined to request one, the indigent prisoner seeking to appeal had no recourse. In *Draper* v. *Washington,* 372 U. S. 487 (1963), the State permitted an indigent to obtain a free transcript of the trial at which he was convicted only if he satisfied the trial judge that his contentions on appeal would not be frivolous. The appealing defendant was in effect bound by the trial court's conclusions in seeking to review the determination of frivolousness, since no transcript or its equivalent was made available to him. In *Smith* v. *Bennett,* 365 U. S. 708 (1961), Iowa had required a filing fee in order to process a state habeas corpus application by a convicted defendant, and in *Burns* v. *Ohio,* 360 U. S. 252 (1959), the State of Ohio required a $20 filing fee in

order to move the Supreme Court of Ohio for leave to appeal from a judgment of the Ohio Court of Appeals affirming a criminal conviction. Each of these state-imposed financial barriers to the adjudication of a criminal defendant's appeal was held to violate the Fourteenth Amendment.

The decisions discussed above stand for the proposition that a State cannot arbitrarily cut off appeal rights for indigents while leaving open avenues of appeal for more affluent persons. In *Douglas* v. *California*, 372 U. S. 353 (1963), however, a case decided the same day as *Lane, supra,* and *Draper, supra,* the Court departed somewhat from the limited doctrine of the transcript and fee cases and undertook an examination of whether an indigent's access to the appellate system was adequate. The Court in *Douglas* concluded that a State does not fulfill its responsibility toward indigent defendants merely by waiving its own requirements that a convicted defendant procure a transcript or pay a fee in order to appeal, and held that the State must go further and provide counsel for the indigent on his first appeal as of right. It is this decision we are asked to extend today.

Petitioners in *Douglas,* each of whom had been convicted by a jury on 13 felony counts, took appeals as of right to the California District Court of Appeal. No filing fee was exacted of them, no transcript was required in order to present their arguments to the Court of Appeal, and the appellate process was therefore open to them. Petitioners, however, claimed that they not only had the right to make use of the appellate process, but were also entitled to court-appointed and state-compensated counsel because they were indigent. The California appellate court examined the trial record on its own initiative, following the then-existing rule in California, and concluded that " 'no good whatever could be

served by appointment of counsel.' " 372 U. S., at 355. It therefore denied petitioners' request for the appointment of counsel.

This Court held unconstitutional California's requirement that counsel on appeal would be appointed for an indigent only if the appellate court determined that such appointment would be helpful to the defendant or to the court itself. The Court noted that under this system an indigent's case was initially reviewed on the merits without the benefit of any organization or argument by counsel. By contrast, persons of greater means were not faced with the preliminary "*ex parte* examination of the record," *id.*, at 356, but had their arguments presented to the court in fully briefed form. The Court noted, however, that its decision extended only to initial appeals as of right, and went on to say:

> "We need not now decide whether California would have to provide counsel for an indigent seeking a discretionary hearing from the California Supreme Court after the District Court of Appeal had sustained his conviction . . . or whether counsel must be appointed for an indigent seeking review of an appellate affirmance of his conviction in this Court by appeal as of right or by petition for a writ of certiorari which lies within the Court's discretion. But it is appropriate to observe that a State can, consistently with the Fourteenth Amendment, provide for differences so long as the result does not amount to a denial of due process or an 'invidious discrimination.' *Williamson* v. *Lee Optical Co.*, 348 U. S. 483, 489; *Griffin* v. *Illinois, supra*, p. 18. Absolute equality is not required; lines can be and are drawn and we often sustain them." *Id.*, at 356–357.

The precise rationale for the *Griffin* and *Douglas* lines of cases has never been explicitly stated, some support

being derived from the Equal Protection Clause of the Fourteenth Amendment, and some from the Due Process Clause of that Amendment.[8] Neither Clause by itself provides an entirely satisfactory basis for the result reached, each depending on a different inquiry which emphasizes different factors. "Due process" emphasizes fairness between the State and the individual dealing with the State, regardless of how other individuals in the same situation may be treated. "Equal protection," on the other hand, emphasizes disparity in treatment by a State between classes of individuals whose situations are arguably indistinguishable. We will address these issues separately in the succeeding sections.

III

Recognition of the due process rationale in *Douglas* is found both in the Court's opinion and in the dissenting opinion of Mr. Justice Harlan. The Court in *Douglas* stated that "[w]hen an indigent is forced to run this gantlet of a preliminary showing of merit, the right to appeal does not comport with fair procedure." 372 U. S., at 357. Mr. Justice Harlan thought that the due process issue in *Douglas* was the only one worthy of extended

[8] The Court of Appeals in this case, for example, examined both possible rationales, stating:

"If the holding [in *Douglas*] be grounded on the equal protection clause, inequality in the circumstances of these cases is as obvious as it was in the circumstances of *Douglas*. If the holding in *Douglas* were grounded on the due process clause, and Mr. Justice Harlan in dissent thought the discourse should have been in those terms, due process encompasses elements of equality. There simply cannot be due process of the law to a litigant deprived of all professional assistance when other litigants, similarly situated, are able to obtain professional assistance and to be benefited by it. The same concepts of fairness and equality, which require counsel in a first appeal of right, require counsel in other and subsequent discretionary appeals." 483 F. 2d, at 655.

consideration, remarking: "The real question in this case, I submit, and the only one that permits of satisfactory analysis, is whether or not the state rule, as applied in this case, is consistent with the requirements of fair procedure guaranteed by the Due Process Clause." *Id.*, at 363.

We do not believe that the Due Process Clause requires North Carolina to provide respondent with counsel on his discretionary appeal to the State Supreme Court. At the trial stage of a criminal proceeding, the right of an indigent defendant to counsel is fundamental and binding upon the States by virtue of the Sixth and Fourteenth Amendments. *Gideon* v. *Wainwright*, 372 U. S. 335 (1963). But there are significant differences between the trial and appellate stages of a criminal proceeding. The purpose of the trial stage from the State's point of view is to convert a criminal defendant from a person presumed innocent to one found guilty beyond a reasonable doubt. To accomplish this purpose, the State employs a prosecuting attorney who presents evidence to the court, challenges any witnesses offered by the defendant, argues rulings of the court, and makes direct arguments to the court and jury seeking to persuade them of the defendant's guilt. Under these circumstances "reason and reflection require us to recognize that in our adversary system of criminal justice, any person haled into court, who is too poor to hire a lawyer, cannot be assured a fair trial unless counsel is provided for him." *Id.*, at 344.

By contrast, it is ordinarily the defendant, rather than the State, who initiates the appellate process, seeking not to fend off the efforts of the State's prosecutor but rather to overturn a finding of guilt made by a judge or jury below. The defendant needs an attorney on appeal not as a shield to protect him against being "haled into court"

by the State and stripped of his presumption of innocence, but rather as a sword to upset the prior determination of guilt. This difference is significant for, while no one would agree that the State may simply dispense with the trial stage of proceedings without a criminal defendant's consent, it is clear that the State need not provide any appeal at all. *McKane* v. *Durston,* 153 U. S. 684 (1894). The fact that an appeal *has* been provided does not automatically mean that a State then acts unfairly by refusing to provide counsel to indigent defendants at every stage of the way. *Douglas* v. *California, supra.* Unfairness results only if indigents are singled out by the State and denied meaningful access to the appellate system because of their poverty. That question is more profitably considered under an equal protection analysis.

IV

Language invoking equal protection notions is prominent both in *Douglas* and in other cases treating the rights of indigents on appeal. The Court in *Douglas,* for example, stated:

> "[W]here the merits of *the one and only appeal* an indigent has as of right are decided without benefit of counsel, we think an unconstitutional line has been drawn between rich and poor." 372 U. S., at 357. (Emphasis in original.)

The Court in *Burns* v. *Ohio,* stated the issue in the following terms:

> "[O]nce the State chooses to establish appellate review in criminal cases, it may not foreclose indigents from access to any phase of that procedure because of their poverty." 360 U. S., at 257.

Despite the tendency of all rights "to declare them-

selves absolute to their logical extreme," [9] there are obviously limits beyond which the equal protection analysis may not be pressed without doing violence to principles recognized in other decisions of this Court. The Fourteenth Amendment "does not require absolute equality or precisely equal advantages," *San Antonio Independent School District* v. *Rodriguez*, 411 U. S. 1, 24 (1973), nor does it require the State to "equalize economic conditions." *Griffin* v. *Illinois*, 351 U. S., at 23 (Frankfurter, J., concurring). It does require that the state appellate system be "free of unreasoned distinctions," *Rinaldi* v. *Yeager*, 384 U. S. 305, 310 (1966), and that indigents have an adequate opportunity to present their claims fairly within the adversary system. *Griffin* v. *Illinois*, *supra*; *Draper* v. *Washington*, 372 U. S. 487 (1963). The State cannot adopt procedures which leave an indigent defendant "entirely cut off from any appeal at all," by virtue of his indigency, *Lane* v. *Brown*, 372 U. S., at 481, or extend to such indigent defendants merely a "meaningless ritual" while others in better economic circumstances have a "meaningful appeal." *Douglas* v. *California*, *supra*, at 358. The question is not one of absolutes, but one of degrees. In this case we do not believe that the Equal Protection Clause, when interpreted in the context of these cases, requires North Carolina to provide free counsel for indigent defendants seeking to take discretionary appeals to the North Carolina Supreme Court, or to file petitions for certiorari in this Court.

A. The North Carolina appellate system, as are the appellate systems of almost half the States,[10] is multitiered, providing for both an intermediate Court of Appeals and a Supreme Court. The Court of Appeals was

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[9] *Hudson County Water Co.* v. *McCarter*, 209 U. S. 349, 355 (1908).

[10] See Brief for Respondent 9 n. 5.

created effective January 1, 1967, and, like other intermediate state appellate courts, was intended to absorb a substantial share of the caseload previously burdening the Supreme Court. In criminal cases, an appeal as of right lies directly to the Supreme Court in all cases which involve a sentence of death or life imprisonment, while an appeal of right in all other criminal cases lies to the Court of Appeals. N. C. Gen. Stat. § 7A–27 (1969 and Supp. 1973). A second appeal of right lies to the Supreme Court in any criminal case "(1) [w]hich directly involves a substantial question arising under the Constitution of the United States or of this State, or (2) [i]n which there is a dissent. . . ." N. C. Gen. Stat. § 7A–30 (1969). All other decisions of the Court of Appeals on direct review of criminal cases may be further reviewed in the Supreme Court on a discretionary basis.

The statute governing discretionary appeals to the Supreme Court is N. C. Gen. Stat. § 7A–31 (1969). This statute provides, in relevant part, that "[i]n any cause in which appeal has been taken to the Court of Appeals . . . the Supreme Court may in its discretion, on motion of any party to the cause or on its own motion, certify the cause for review by the Supreme Court, either before or after it has been determined by the Court of Appeals." The statute further provides that "[i]f the cause is certified for transfer to the Supreme Court after its determination by the Court of Appeals, the Supreme Court reviews the decision of the Court of Appeals." The choice of cases to be reviewed is not left entirely within the discretion of the Supreme Court but is regulated by statutory standards. Subsection (c) of this provision states:

> "In causes subject to certification under subsection (a) of this section, certification may be made by the Supreme Court after determination of the cause by the Court of Appeals when in the opinion of the

> Supreme Court (1) The subject matter of the appeal has significant public interest, or (2) The cause involves legal principles of major significance to the jurisprudence of the State, or (3) The decision of the Court of Appeals appears likely to be in conflict with a decision of the Supreme Court."

Appointment of counsel for indigents in North Carolina is governed by N. C. Gen. Stat. § 7A–450 *et seq.* (1969 and Supp. 1973). These provisions, although perhaps on their face broad enough to cover appointments such as those respondent sought here,[11] have generally been construed to limit the right to appointed counsel in criminal cases to direct appeals taken as of right. Thus North Carolina has followed the mandate of *Douglas* v. *California, supra,* and authorized appointment of counsel for a convicted defendant appealing to the intermediate Court of Appeals, but has not gone beyond *Douglas* to provide for appointment of counsel for a defendant who seeks either discretionary review in the Supreme Court of North Carolina or a writ of certiorari here.

B. The facts show that respondent, in connection with his Mecklenburg County conviction, received the benefit of counsel in examining the record of his trial and in preparing an appellate brief on his behalf for the state Court of Appeals. Thus, prior to his seeking discretionary review in the State Supreme Court, his claims had "once been presented by a lawyer and passed upon by an appellate court." *Douglas* v. *California,* 372 U. S.,

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[11] For example, subsection (b)(6) of § 7A–451, effective at the time of respondent's appeals, provides for counsel on "[d]irect review of any judgment or decree, including review by the United States Supreme Court of final judgment or decrees rendered by the highest court of North Carolina in which decision may be had." But this provision apparently has not been construed to allow counsel for permissive appellate procedures. See 483 F. 2d, at 652.

at 356. We do not believe that it can be said, therefore, that a defendant in respondent's circumstances is denied meaningful access to the North Carolina Supreme Court simply because the State does not appoint counsel to aid him in seeking review in that court. At that stage he will have, at the very least, a transcript or other record of trial proceedings, a brief on his behalf in the Court of Appeals setting forth his claims of error, and in many cases an opinion by the Court of Appeals disposing of his case. These materials, supplemented by whatever submission respondent may make *pro se*, would appear to provide the Supreme Court of North Carolina with an adequate basis for its decision to grant or deny review.

We are fortified in this conclusion by our understanding of the function served by discretionary review in the North Carolina Supreme Court. The critical issue in that court, as we perceive it, is not whether there has been "a correct adjudication of guilt" in every individual case, see *Griffin* v. *Illinois*, 351 U. S., at 18, but rather whether "the subject matter of the appeal has significant public interest," whether "the cause involves legal principles of major significance to the jurisprudence of the State," or whether the decision below is in probable conflict with a decision of the Supreme Court. The Supreme Court may deny certiorari even though it believes that the decision of the Court of Appeals was incorrect, see *Peaseley* v. *Virginia Iron, Coal & Coke Co.*, 282 N. C. 585, 194 S. E. 2d 133 (1973), since a decision which appears incorrect may nevertheless fail to satisfy any of the criteria discussed above. Once a defendant's claims of error are organized and presented in a lawyerlike fashion to the Court of Appeals, the justices of the Supreme Court of North Carolina who make the decision to grant or deny discretionary review should be able to ascertain whether his case satisfies the standards established by the legislature for such review.

This is not to say, of course, that a skilled lawyer, particularly one trained in the somewhat arcane art of preparing petitions for discretionary review, would not prove helpful to any litigant able to employ him. An indigent defendant seeking review in the Supreme Court of North Carolina is therefore somewhat handicapped in comparison with a wealthy defendant who has counsel assisting him in every conceivable manner at every stage in the proceeding. But both the opportunity to have counsel prepare an initial brief in the Court of Appeals and the nature of discretionary review in the Supreme Court of North Carolina make this relative handicap far less than the handicap borne by the indigent defendant denied counsel on his initial appeal as of right in *Douglas*. And the fact that a particular service might be of benefit to an indigent defendant does not mean that the service is constitutionally required. The duty of the State under our cases is not to duplicate the legal arsenal that may be privately retained by a criminal defendant in a continuing effort to reverse his conviction, but only to assure the indigent defendant an adequate opportunity to present his claims fairly in the context of the State's appellate process. We think respondent was given that opportunity under the existing North Carolina system.

V

Much of the discussion in the preceding section is equally relevant to the question of whether a State must provide counsel for a defendant seeking review of his conviction in this Court. North Carolina will have provided counsel for a convicted defendant's only appeal as of right, and the brief prepared by that counsel together with one and perhaps two North Carolina appellate opinions will be available to this Court in order that it may decide whether or not to grant certiorari. This

Court's review, much like that of the Supreme Court of North Carolina, is discretionary and depends on numerous factors other than the perceived correctness of the judgment we are asked to review.

There is also a significant difference between the source of the right to seek discretionary review in the Supreme Court of North Carolina and the source of the right to seek discretionary review in this Court. The former is conferred by the statutes of the State of North Carolina, but the latter is granted by statute enacted by Congress. Thus the argument relied upon in the *Griffin* and *Douglas* cases, that the State having once created a right of appeal must give all persons an equal opportunity to enjoy the right, is by its terms inapplicable. The right to seek certiorari in this Court is not granted by any State, and exists by virtue of federal statute with or without the consent of the State whose judgment is sought to be reviewed.

The suggestion that a State is responsible for providing counsel to one petitioning this Court simply because it initiated the prosecution which led to the judgment sought to be reviewed is unsupported by either reason or authority. It would be quite as logical under the rationale of *Douglas* and *Griffin*, and indeed perhaps more so, to require that the Federal Government or this Court furnish and compensate counsel for petitioners who seek certiorari here to review state judgments of conviction. Yet this Court has followed a consistent policy of denying applications for appointment of counsel by persons seeking to file jurisdictional statements or petitions for certiorari in this Court. See, *e. g.*, *Drumm* v. *California*, 373 U. S. 947 (1963); *Mooney* v. *New York*, 373 U. S. 947 (1963); *Oppenheimer* v. *California*, 374 U. S. 819 (1963). In the light of these authorities, it would be odd, indeed, to read the Fourteenth Amendment to

impose such a requirement on the States, and we decline to do so.

VI

We do not mean by this opinion to in any way discourage those States which have, as a matter of legislative choice, made counsel available to convicted defendants at all stages of judicial review. Some States which might well choose to do so as a matter of legislative policy may conceivably find that other claims for public funds within or without the criminal justice system preclude the implementation of such a policy at the present time. North Carolina, for example, while it does not provide counsel to indigent defendants seeking discretionary review on appeal, does provide counsel for indigent prisoners in several situations where such appointments are not required by any constitutional decision of this Court.[12] Our reading

[12] Section 7A–451 of N. C. Gen. Stat. (Supp. 1973) provides:

"(a) An indigent person is entitled to services of counsel in the following actions and proceedings:

"(1) Any case in which imprisonment, or a fine of five hundred dollars ($500.00), or more, is likely to be adjudged;

"(2) A hearing on a petition for a writ of habeas corpus under Chapter 17 of the General Statutes;

"(3) A post-conviction proceeding under Chapter 15 of the General Statutes;

"(4) A hearing for revocation of probation, if confinement is likely to be adjudged as a result of the hearing;

"(5) A hearing in which extradition to another state is sought;

"(6) A proceeding for judicial hospitalization under Chapter 122, Article 7 (Judicial Hospitalization) or Article 11 (Mentally Ill Criminals), of the General Statutes and a proceeding for involuntary commitment to a treatment facility under Article 5 of Chapter 122 of the General Statutes;

"(7) A civil arrest and bail proceeding under Chapter 1, Article 34, of the General Statutes; and

"(8) In the case of a juvenile, a hearing as a result of which commitment to an institution or transfer to the superior court for trial on a felony charge is possible."

of the Fourteenth Amendment leaves these choices to the State, and respondent was denied no right secured by the Federal Constitution when North Carolina refused to provide counsel to aid him in obtaining discretionary appellate review.

The judgment of the Court of Appeals' holding to the contrary is

Reversed.

MR. JUSTICE DOUGLAS, with whom MR. JUSTICE BRENNAN and MR. JUSTICE MARSHALL concur, dissenting.

I would affirm the judgment below because I am in agreement with the opinion of Chief Judge Haynsworth for a unanimous panel in the Court of Appeals. 483 F. 2d 650.

In *Douglas* v. *California*, 372 U. S. 353, we considered the necessity for appointed counsel on the first appeal as of right, the only issue before us. We did not deal with the appointment of counsel for later levels of discretionary review, either to the higher state courts or to this Court, but we noted that "there can be no equal justice where the kind of an appeal a man enjoys 'depends on the amount of money he has.' " *Id.*, at 355.

Chief Judge Haynsworth could find "no logical basis for differentiation between appeals of right and permissive review procedures in the context of the Constitution and the right to counsel." 483 F. 2d, at 653. More familiar with the functioning of the North Carolina criminal justice system than are we, he concluded that "in the context of constitutional questions arising in criminal prosecutions, permissive review in the state's highest court may be predictably the most meaningful review the conviction will receive." *Ibid.* The North Carolina Court of Appeals, for example, will be constrained in diverging from an earlier opinion of the State Supreme Court, even if

subsequent developments have rendered the earlier Supreme Court decision suspect. "[T]he state's highest court remains the ultimate arbiter of the rights of its citizens." *Ibid.*

Chief Judge Haynsworth also correctly observed that the indigent defendant proceeding without counsel is at a substantial disadvantage relative to wealthy defendants represented by counsel when he is forced to fend for himself in seeking discretionary review from the State Supreme Court or from this Court. It may well not be enough to allege error in the courts below in layman's terms; a more sophisticated approach may be demanded: *

"An indigent defendant is as much in need of the

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*An indigent defendant proceeding without the assistance of counsel would be attempting to satisfy one of three statutory standards for review when seeking certiorari from the North Carolina Supreme Court:

"(1) The subject matter of the appeal has significant public interest, or

"(2) The cause involves legal principles of major significance to the jurisprudence of the State, or

"(3) The decision of the Court of Appeals appears likely to be in conflict with a decision of the Supreme Court." N. C. Gen. Stat. § 7A–31 (c) (1969).

It seems likely that only the third would have been explored in a brief on the merits before the Court of Appeals, and the indigent defendant would draw little assistance from that brief in attempting to satisfy either of the first two standards.

Rule 19 of this Court provides some guidelines for the exercise of our certiorari jurisdiction, including decisions by a state court on federal questions not previously decided by this Court; but it may not be enough simply to assert that there was error in the decision of the court below. Cf. *Magnum Import Co.* v. *Coty*, 262 U. S. 159, 163. Moreover, this Court is greatly aided by briefs prepared with accuracy, brevity, and clarity in its determination of whether certiorari should be granted. See *Furness, Withy & Co.* v. *Yang-Tsze Insurance Assn.*, 242 U. S. 430, 434.

> assistance of a lawyer in preparing and filing a petition for certiorari as he is in the handling of an appeal as of right. In many appeals, an articulate defendant could file an effective brief by telling his story in simple language without legalisms, but the technical requirements for applications for writs of certiorari are hazards which one untrained in the law could hardly be expected to negotiate.
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> " 'Certiorari proceedings constitute a highly specialized aspect of appellate work. The factors which [a court] deems important in connection with deciding whether to grant certiorari are certainly not within the normal knowledge of an indigent appellant. Boskey, The Right to Counsel in Appellate Proceedings, 45 Minn. L. Rev. 783, 797 (1961) (footnote omitted).' " 483 F. 2d, at 653.

Furthermore, the lawyer who handled the first appeal in a case would be familiar with the facts and legal issues involved in the case. It would be a relatively easy matter for the attorney to apply his expertise in filing a petition for discretionary review to a higher court, or to advise his client that such a petition would have no chance of succeeding.

Douglas v. *California* was grounded on concepts of fairness and equality. The right to seek discretionary review is a substantial one, and one where a lawyer can be of significant assistance to an indigent defendant. It was correctly perceived below that the "same concepts of fairness and equality, which require counsel in a first appeal of right, require counsel in other and subsequent discretionary appeals." *Id.*, at 655.

MOODY ET AL. *v.* ALBEMARLE PAPER CO. ET AL.

CERTIFICATE FROM THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

No. 73–899. Decided June 17, 1974

Although 28 U. S. C. § 46 (c) provides that a retired circuit judge may sit on an in banc court rehearing a case in which he participated at the original hearing, only regular active service circuit judges are vested with authority to vote whether to rehear a case in banc.

PER CURIAM.

Appeals from the judgments of the trial courts in two cases were heard and determined by two separate three-judge divisions of the Court of Appeals for the Fourth Circuit. Sitting by designation as members of each of the divisions were senior judges of the Fourth Circuit.[1] Following decisions by both divisions, the unsuccessful parties petitioned for rehearings in banc pursuant to 28 U. S. C. § 46 (c): [2]

"Cases and controversies shall be heard and deter-

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[1] The Court of Appeals for the Fourth Circuit is composed of seven judges in regular active service, 28 U. S. C. § 44, and two judges who have retired from that service but remain available for duties as designated and assigned, known as senior judges, 28 U. S. C. § 294 (b). In *Moody* v. *Albemarle Paper Co.*, both of those senior judges were designated members of the three-judge division which originally decided that appeal, see 474 F. 2d 134; in *Williams* v. *Albemarle City Board of Education*, one of the senior judges was so designated, see 485 F. 2d 232; 28 U. S. C. § 294 (c).

[2] Federal Rule App. Proc. 35 provides in part:

"(a) *When Hearing or Rehearing in Banc Will Be Ordered.* A majority of the circuit judges who are in regular active service may order that an appeal or other proceeding be heard or reheard by the court of appeals in banc. Such a hearing or rehearing is not favored and ordinarily will not be ordered except (1) when con-

> mined by a court or division of not more than three judges, unless a hearing or rehearing before the court in banc is ordered by a majority of the circuit judges of the circuit *who are in regular active service.* A court in banc shall consist of all circuit judges in regular active service. A circuit judge of the circuit who has retired from regular active service shall also be competent to sit as a judge of the court in banc in the rehearing of a case or controversy if he sat in the court or division at the original hearing thereof." (Emphasis added.)

It had been the practice of the Fourth Circuit to count the votes of their senior judges who were members of the original hearing division when the court acted on the question whether to order a rehearing in banc. In those cases, however, the votes of the senior judges were not crucial. Certificate 3. Here, their votes are crucial. In *Moody,* while a "majority of the circuit judges of the circuit who are in regular active service" did not vote for a rehearing in banc, the two senior judges who sat on the division by designation did so vote; their votes, if counted, would make a majority for rehearing. In *Williams,* while a majority of Circuit Judges in regular active service did vote for a rehearing in banc, the senior judge who sat on the original division by designation

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sideration by the full court is necessary to secure or maintain uniformity of its decisions, or (2) when the proceeding involves a question of exceptional importance.

"(b) *Suggestion of a Party for Hearing or Rehearing in Banc.* A party may suggest the appropriateness of a hearing or rehearing in banc. The clerk shall transmit any such suggestion to the judges of the court who are in regular active service but a vote will not be taken to determine whether the cause shall be heard or reheard in banc unless a judge in regular active service or a judge who was a member of the panel that rendered a decision sought to be reheard requests a vote on such a suggestion made by a party."

voted against rehearing; with his vote counted the rehearing would fail by an equal division of those voting.

Accordingly, all Circuit Judges of the Fourth Circuit in regular active service and both senior judges of the Circuit have, pursuant to 28 U. S. C. § 1254 (3), certified to us the question whether a senior judge of the circuit who was a member of the original division hearing a case may vote to determine whether the case should be reheard in banc. Because of the importance of the question to the administration of judicial business in the circuits, as well as to the parties in the two cases pending in the Fourth Circuit, we granted leave to and invited those parties to file briefs in response to the question certified. Upon consideration of the question and the briefs filed by the litigants on both sides of both pending cases, we conclude that the answer should be in the negative; senior circuit judges who are members of the originally assigned division hearing a case are not authorized by Congress to participate in the determination whether to rehear that case in banc.

The power of courts of appeals to hear or rehear cases in banc was first determined in *Textile Mills Corp.* v. *Commissioner,* 314 U. S. 326 (1941). In 1948, Congress provided legislative ratification of *Textile Mills* by enacting § 46 (c) of the Judicial Code, which then provided that hearings or rehearings before courts of appeals in banc were to be:

> "ordered by a majority of the circuit judges of the circuit *who are in active service.* A court in banc shall consist of all active circuit judges of the circuit." 28 U. S. C. § 46 (c) (1952 ed.). (Emphasis added.)

In the *Western Pacific Railroad Case,* 345 U. S. 247 (1953), the Court had occasion to construe the 1948 statute, and determined that it was a grant of

power to the courts of appeals to order hearings or rehearings in banc, not the creation of a right in litigants to compel such hearings or rehearings or even to compel the court to vote on the question of hearing or rehearing. The Court also addressed itself to the procedure governing the exercise of this power, holding that each court of appeals was "left free to devise its own administrative machinery to provide the means whereby a majority may order such a hearing." [3] *Id.*, at 250. This discretion has been subsequently confirmed. *Shenker* v. *Baltimore & Ohio R. Co.*, 374 U. S. 1, 5 (1963); *United States* v. *American-Foreign S. S. Corp.*, 363 U. S. 685, 688 (1960).

In one of these latter cases, *American-Foreign*, a question arose under the language of the 1948 statute whether, if rehearing in banc was voted, senior judges were eligible to participate in the decision of that case on the merits. The Court held that senior judges were not eligible to sit. Congress in 1963 then enacted the present version of § 46 (c), which provides that a senior judge who sat on the original division hearing a case is "competent *to sit* as a judge of the court in banc" in the merits rehearing of the case. (Emphasis added.)

[3] The machinery devised by the Ninth Circuit in that case was one which governed the initiation of the polling of the court to determine whether it should hear or rehear a case in banc. Although there was some uncertainty whether indeed the Ninth Circuit had provided such machinery, 345 U. S. 247, 263, its nature was to delegate to the three-judge division first hearing the case the power to initiate a poll of the court. *Id.*, at 259. Two of the judges who were members of the division in that case were district judges. *Id.*, at 263. This machinery was similar in kind to that now set forth in Fed. Rule App. Proc. 35 (b), *supra*, n. 2, by which a vote to hear or rehear a case in banc will not be taken unless such a vote is requested by a judge in regular active service, or a judge who was a member of the division that rendered a decision sought to be reheard.

But the language of the statute concerning how the court *orders* a rehearing in banc was not changed, except to reinforce the limitation on the grant of power by adding "regular" before "active service," sharpening the definition of which judges may participate in ordering a hearing or rehearing in banc.

The language of the present statute thus confines the power to order a rehearing in banc to those circuit judges who are in "regular active service." Although, as the Court has held, those judges are largely free to devise whatever procedures they choose to initiate the process of decision to order such a rehearing, and to decide who may participate in those preliminary procedures, see n. 3, *supra*, neither the Court nor Congress has suggested that any other than a regular active service judge is eligible to participate in the making of the decision whether to hear or rehear a case in banc. Obviously such a decision can be reached only by voting. As revealed by the decisional and statutory evolution of the institution of the in banc court, the eligibility of senior judges for participation therein has been the exception, not the rule. We are not at liberty to engraft upon the statute a meaning inconsistent with its historical limitations.

Indeed, the very purpose of the in banc court supports our conclusion that senior judges have not been authorized by implication to participate in ordering a hearing or rehearing in banc. As the Federal Rule indicates, *supra*, n. 2, the in banc court is normally reserved for questions of exceptional importance, or to secure or maintain uniformity of decision within the circuit. In the wise use of this exceptional power to " 'determine the major doctrinal trends of the future' " for a particular circuit, *American-Foreign*, 363 U. S., at 690, Congress appears to have contemplated the need for an intimate and current working knowledge of, among other

things, the decisions of the circuit, its pending cases, and the magnitude and nature of its future workload. Senior judges provide a judicial resource of extraordinary value by their willingness to undertake important assignments "without economic incentive of any kind." *Id.*, at 688 n. 4. Consistent therewith, Congress has provided that when a senior judge has participated in the original division hearing, such senior judge may later sit on an in banc court rehearing that case; this was the purpose of the 1963 amendment to the Judicial Code. But voting *on the merits* of an in banc case is quite different from voting *whether to rehear* a case in banc, which is essentially a policy decision of judicial administration. Congress vested this latter authority and responsibility exclusively in "circuit judges of the circuit who are in regular active service," 28 U. S. C. § 46 (c); because of their different nature, we cannot assume the grant of authority to do one includes authority to do the other.

The question certified to us is therefore answered in the negative.[4]

MR. JUSTICE POWELL took no part in the consideration or decision of this case.

[4] The only other courts of appeals which have discussed the issue have ruled similarly. *Zahn* v. *International Paper Co.*, 469 F. 2d 1033, 1040–1042 (CA2 1972) (statements and dissent upon denial of rehearing in banc); *Allen* v. *Johnson*, 391 F. 2d 527, 532 (CA5 1968) (in banc).

JIMENEZ ET AL. *v.* WEINBERGER, SECRETARY OF HEALTH, EDUCATION, AND WELFARE

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS

No. 72–6609. Argued March 18, 1974—Decided June 19, 1974

Under the Social Security Act illegitimate children are deemed entitled to disability insurance benefits without any showing that they are in fact dependent upon their disabled parent if state law permits them to inherit from the wage-earner parent; if their illegitimacy results solely from formal, nonobvious defects in their parents' ceremonial marriage; or if they are legitimated in accordance with state law. An illegitimate child unable to meet any of the foregoing conditions can qualify only if the disabled wage-earner parent contributed to the child's support or lived with him prior to the parent's disability, 42 U. S. C. § 416 (h) (3) (B); if the child is unable to meet any of the foregoing conditions, the statute bars the child's benefits without any opportunity to establish entitlement thereto. Ramon Jimenez, a resident of Illinois (which does not allow nonlegitimated illegitimate children to inherit from their father), is a wage earner covered by the Act who became entitled to disability benefits in October 1963. Thereafter, Jimenez applied for insurance benefits for appellants, two of his nonlegitimated illegitimate children who were born after the onset of disability. The claims were denied since the children did not meet the requirements of 42 U. S. C. § 416 (h) (3) (B) or the other qualifying provisions of the Act. Appellants brought this action for review of the denial of benefits. A three-judge District Court upheld the statutory classification as being rationally related to the proper governmental interest of avoiding spurious claims. *Held:* Title 42 U. S. C. § 416 (h) (3) (B), as part of the statutory scheme applicable to illegitimates, contravenes the Due Process Clause of the Fifth Amendment and the equal protection of the laws guaranteed thereby. Pp. 631–638.

(a) "[T]he Equal Protection Clause [is violated by] dis-

criminatory laws relating to status of birth where . . . the classification is justified by no legitimate state interest, compelling or otherwise." *Weber* v. *Aetna Casualty & Surety Co.*, 406 U. S. 164, 176. *Dandridge* v. *Williams*, 397 U. S. 471, distinguished. Pp. 631–634.

(b) The primary purpose of the contested provision of the Act is to provide support for dependents of a disabled wage earner and is not, as appellee contends, to replace only that support actually enjoyed before the onset of disability. Pp. 634–635.

(c) The complete statutory bar to disability benefits imposed upon nonlegitimated afterborn illegitimates in appellants' position, is not reasonably related to the valid governmental interest of preventing spurious claims. The potential for spurious claims is the same as to both. Even if children might rationally be classified on the basis of whether they are dependent upon their disabled parents, the Act's definition of two subclasses of illegitimates is "overinclusive" in that it benefits some children who are legitimated, or entitled to inherit, or illegitimate solely because of a defect in the marriage of their parents, but who are not dependent on their disabled parent. Conversely, the Act is "underinclusive" in that it conclusively excludes some illegitimates in appellants' subclass who are, in fact, dependent upon their disabled parent. Pp. 635–637.

(d) The judgment is vacated and the case is remanded to provide appellants an opportunity to establish their claim to eligibility as "children" of the claimant eligible for benefits under the Act. Pp. 637–638.

353 F. Supp. 1356, vacated and remanded.

BURGER, C. J., delivered the opinion of the Court, in which DOUGLAS, BRENNAN, STEWART, WHITE, MARSHALL, BLACKMUN, and POWELL, JJ., joined. REHNQUIST, J., filed a dissenting opinion, *post*, p. 638.

Jane G. Stevens argued the cause and filed briefs for appellants.

Danny J. Boggs argued the cause for appellee. With him on the brief were *Solicitor General Bork, Acting Assistant Attorney General Jaffe,* and *William Kanter.*

MR. CHIEF JUSTICE BURGER delivered the opinion of the Court.

A three-judge District Court in the Northern District of Illinois upheld the constitutionality of a provision of the Social Security Act which provides that certain illegitimate children, who cannot qualify for benefits under any other provision of the Act, may obtain benefits if, but only if, the disabled wage-earner parent is shown to have contributed to the child's support or to have lived with him prior to the parent's disability.[1] The District Court held that the statute's classification is rationally related to the legitimate governmental interest of avoiding spurious claims. *Jimenez* v. *Richardson*, 353 F. Supp. 1356, 1361 (1973). We noted probable jurisdiction. 414 U. S. 1061.

The relevant facts are not in dispute. Ramon Jimenez, a wage earner covered under the Social Security Act, became disabled in April 1963, and became entitled to disability benefits in October 1963. Some years prior to that time, the claimant separated from his wife and began living with Elizabeth Hernandez, whom he never married. Three children were born to them, Magdalena, born August 13, 1963, Eugenio, born January 18, 1965, and Alicia, born February 24, 1968. These children have lived in Illinois with claimant all their lives; he has formally acknowledged them to be his children, has supported and cared for them since their birth, and has been their sole caretaker since their mother left the household late in 1968. Since the parents never married, these children are classified as illegitimate under Illinois law and are unable to inherit from their father because they are nonlegitimated illegitimate children. Ill. Ann. Stat., c. 3, § 12 (Supp. 1974).

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[1] 42 U. S. C. § 416 (h) (3).

On August 21, 1968, Ramon Jimenez, as the father, filed an application for child's insurance benefits on behalf of these three children. Magdalena was found to be entitled to child's insurance benefits under the Social Security Act, and no issue is presented with respect to her claim. The claims of appellants, Eugenio and Alicia, were denied, however, on the ground that they did not meet the requirements of 42 U. S. C. § 416 (h) (3), since neither child's paternity had been acknowledged or affirmed through evidence of domicile and support before the onset of their father's disability.[2] In all other respects Eugenio and Alicia are eligible to receive child's insurance benefits, and their applications were denied solely because they are proscribed illegitimate children who were not dependent on Jimenez at the time of the onset of his disability.

Appellants urge that the contested Social Security provision is based upon the so-called "suspect classification" of illegitimacy. Like race and national origin, they argue, illegitimacy is a characteristic determined solely by the accident of birth; it is a condition beyond the control of the children, and it is a status that subjects the children to a stigma of inferiority and a badge of opprobrium. We need not reach appellants' argument, however, be-

[2] The contested Social Security scheme provides, in essence, that legitimate or legitimated children (42 U. S. C. § 402 (d) (3)), illegitimate children who can inherit their parent's personal property under the intestacy laws of the State of the insured's domicile (42 U. S. C. § 416 (h) (2) (A)), and those children who cannot inherit only because their parents' ceremonial marriage was invalid for nonobvious defects (42 U. S. C. § 416 (h) (2) (B)), are entitled to receive benefits without any further showing of parental support. However, illegitimate children such as Eugenio and Alicia who were not living with or being supported by the applicant at the time the claimant's period of disability began, and who do not fall into one of the foregoing categories, are not entitled to receive any benefits. 42 U. S. C. § 416 (h) (3).

cause in the context of this case it is enough that we note, as we did in *Weber* v. *Aetna Casualty & Surety Co.*, 406 U. S. 164 (1972):

> "The status of illegitimacy has expressed through the ages society's condemnation of irresponsible liaisons beyond the bonds of marriage. But visiting this condemnation on the head of an infant is illogical and unjust. Moreover, imposing disabilities on the illegitimate child is contrary to the basic concept of our system that legal burdens should bear some relationship to individual responsibility or wrongdoing. Obviously, no child is responsible for his birth and penalizing the illegitimate child is an ineffectual—as well as an unjust—way of deterring the parent. Courts are powerless to prevent the social opprobrium suffered by these hapless children, but the Equal Protection Clause does enable us to strike down discriminatory laws relating to status of birth where . . . the classification is justified by no legitimate state interest, compelling or otherwise." *Id.*, at 175–176.

Conversely, the Secretary urges us to uphold this statutory scheme on the ground that the case is controlled by the Court's recent ruling in *Dandridge* v. *Williams*, 397 U. S. 471 (1970), where we noted:

> "In the area of economics and social welfare, a State does not violate the Equal Protection Clause merely because the classifications made by its laws are imperfect. If the classification has some 'reasonable basis,' it does not offend the Constitution simply because the classification 'is not made with mathematical nicety or because in practice it results in some inequality.' *Lindsley* v. *Natural Carbonic Gas Co.*, 220 U. S. 61, 78. 'The problems of government are

> practical ones and may justify, if they do not require, rough accommodations—illogical, it may be, and unscientific.' *Metropolis Theatre Co.* v. *City of Chicago,* 228 U. S. 61, 69–70. 'A statutory discrimination will not be set aside if any state of facts reasonably may be conceived to justify it.' *McGowan* v. *Maryland,* 366 U. S. 420, 426." *Id.,* at 485.

However, *Dandridge* involved an equal protection attack upon Maryland's Aid to Families with Dependent Children program which provided aid in accordance with the family's standard of need, but limited the maximum grant to $250 per family, regardless of size, thereby reducing the per capita allowance for children of large families. We noted that the AFDC welfare program is a " 'scheme of cooperative federalism' " and that the "starting point of the statutory analysis must be a recognition that the federal law gives each State great latitude in dispensing its available funds." *Id.,* at 478. This special deference to Maryland's statutory approach was necessary because, "[g]iven Maryland's finite resources, its choice is either to support some families adequately and others less adequately, or not to give sufficient support to any family." *Id.,* at 479. Here, by contrast, there is no evidence supporting the contention that to allow illegitimates in the classification of appellants to receive benefits would significantly impair the federal Social Security trust fund and necessitate a reduction in the scope of persons benefited by the Act. On the contrary, the Secretary has persistently maintained that the purpose of the contested statutory scheme is to provide support for dependents of a wage earner who has lost his earning power, and that the provisions excluding some afterborn illegitimates from recovery are designed only to prevent spurious claims and ensure that only those actually

entitled to benefit receive payments. Accepting this view of the relevant provisions of the Act, we cannot conclude that the purpose of the statutory exclusion of some afterborn illegitimates is to achieve a necessary allocation of finite resources and, to that extent, *Dandridge* is distinguishable and not controlling.

As we have noted, the primary purpose of the contested Social Security scheme is to provide support for dependents of a disabled wage earner.[3] The Secretary maintains that the Act denies benefits to afterborn illegitimates who cannot inherit or whose illegitimacy is not solely because of a formal, nonobvious defect in their parents' wedding ceremony, or who are not legitimated, because it is "likely" that these illegitimates, as a class, will not possess the requisite economic dependency on the wage earner which would entitle them to recovery under the Act and because eligibility for such benefits to those illegitimates would open the door to spurious claims. Under this view the Act's purpose would be to replace only that support enjoyed prior to the onset of disability; no child would be eligible to receive benefits unless the child had experienced actual support from the wage earner prior to the disability, and no child born after the onset of the wage earner's disability would be allowed to recover. We do not read the statute as supporting that view of its purpose. Under the statute it is clear that illegitimate children born after the wage earner becomes disabled qualify for benefits if state law permits them to inherit from the wage earner, § 416 (h) (2) (A); or if their illegitimacy results solely

[3] See House-Senate Conference Committee Report on 1965 Amendments to Social Security Act, 111 Cong. Rec. 18387 (1965); Report of the U. S. Advisory Council on Social Security, the Status of the Social Security Program and Recommendations for its Improvement 67 (1965).

from formal, nonobvious defects in their parents' ceremonial marriage, § 416 (h)(2)(B); or if they are legitimated in accordance with state law, § 402 (d)(3)(A). Similarly, legitimate children born after their wage-earning parent has become disabled and legitimate children born before the onset of disability are entitled to benefits regardless of whether they were living with or being supported by the disabled parent at the onset of the disability, §§ 402 (d) (1) and (3).

In each of the examples just mentioned, the child is by statute "deemed dependent" upon the parent by virtue of his status and no dependency or paternity need be shown for the child to qualify for benefits. However, nonlegitimated illegitimates in appellants' position, who cannot inherit under state law and whose illegitimacy does not derive solely from a defect in their parents' wedding ceremony, are denied a parallel right to the dependency presumption under the Act. Their dilemma is compounded by the fact that the statute denies them any opportunity to prove dependency in order to establish their "claim" to support and, hence, their right to eligibility. § 416 (h) (3) (B). The Secretary maintains that this absolute bar to disability benefits is necessary to prevent spurious claims because "[t]o the unscrupulous person, all that prevents him from realizing . . . gain is the mere formality of a spurious acknowledgment of paternity or a collusive paternity suit with the mother of an illegitimate child who is herself desirous or in need of the additional cash." *Jimenez* v. *Richardson*, 353 F. Supp., at 1361.

From what has been outlined it emerges that afterborn illegitimate children are divided into two subclassifications under this statute. One subclass is made up of those (a) who can inherit under state intestacy laws, or (b) who are legitimated under state law, or (c) who are

illegitimate only because of some formal defect in their parents' ceremonial marriage. These children are deemed entitled to receive benefits under the Act without any showing that they are in fact dependent upon their disabled parent. The second subclassification of afterborn illegitimate children includes those who are conclusively denied benefits because they do not fall within one of the foregoing categories and are not entitled to receive insurance benefits under any other provision of the Act.

We recognize that the prevention of spurious claims is a legitimate governmental interest and that dependency of illegitimates in appellants' subclass, as defined under the federal statute, has not been legally established even though, as here, paternity has been acknowledged. As we have noted, the Secretary maintains that the possibility that evidence of parentage or support may be fabricated is greater when the child is not born until after the wage earner has become entitled to benefits. It does not follow, however, that the blanket and conclusive exclusion of appellants' subclass of illegitimates is reasonably related to the prevention of spurious claims. Assuming that the appellants are in fact dependent on the claimant, it would not serve the purposes of the Act to conclusively deny them an opportunity to establish their dependency and their right to insurance benefits, and it would discriminate between the two subclasses of afterborn illegitimates without any basis for the distinction since the potential for spurious claims is exactly the same as to both subclasses.

The Secretary does not contend that it is necessarily or universally true that all illegitimates in appellants' subclass would be unable to establish their dependency and eligibility under the Act if the statute gave them an opportunity to do so. Nor does he suggest a basis for the assumption that all illegitimates who are statutorily

deemed entitled to benefits under the Act are in fact dependent upon their disabled parent. Indeed, as we have noted, those illegitimates statutorily deemed dependent are entitled to benefits regardless of whether they were living in, or had ever lived in, a dependent family setting with their disabled parent. Even if children might rationally be classified on the basis of whether they are dependent upon their disabled parent, the Act's definition of these two subclasses of illegitimates is "overinclusive" in that it benefits some children who are legitimated, or entitled to inherit, or illegitimate solely because of a defect in the marriage of their parents, but who are not dependent on their disabled parent. Conversely, the Act is "underinclusive" in that it conclusively excludes some illegitimates in appellants' subclass who are, in fact, dependent upon their disabled parent. Thus, for all that is shown in this record, the two subclasses of illegitimates stand on equal footing, and the potential for spurious claims is the same as to both; hence to conclusively deny one subclass benefits presumptively available to the other denies the former the equal protection of the laws guaranteed by the due process provision of the Fifth Amendment. *Schneider* v. *Rusk*, 377 U. S. 163, 168 (1964); *Bolling* v. *Sharpe*, 347 U. S. 497, 499 (1954).

In the District Court the Secretary, relying on the validity of the statutory exclusion, did not undertake to challenge the assertion that appellants are the children of the claimant, that they lived with the claimant all their lives, that he has formally acknowledged them to be his children, and that he has supported and cared for them since their birth. Accordingly, the judgment is vacated and the case is remanded to provide appellants an opportunity, consistent with this opinion, to establish their

claim to eligibility as "children" of the claimant under the Social Security Act.

Vacated and remanded.

MR. JUSTICE REHNQUIST, dissenting.

I frankly find the Court's opinion in this case a perplexing three-legged stool. The holding is clearly founded in notions of equal protection, see *ante*, at 637, and the Court speaks specifically of improper "discrimination." Yet the opinion has strong due process overtones as well, at times appearing to pay homage to the still novel, and I think unsupportable, theory that "irrebuttable presumptions" violate due process. At other times the opinion seems to suggest that the real problem in this case is the Government's failure to build an adequate evidentiary record in support of the challenged legislation. The result is a rather impressionistic determination that Congress' efforts to cope with spurious claims of entitlement, while preserving maximum benefits for those persons most likely to be deserving, are simply not satisfactory to the members of this Court. I agree with neither the Court's approach nor its decision.

The Court's equal protection analysis is perhaps most difficult to understand. The Court apparently finds no need to resolve the question of whether illegitimacy constitutes a "suspect classification," noting instead that " 'the Equal Protection Clause does enable us to strike down discriminatory laws *relating to status of birth* where . . . the classification is justified by no legitimate state interest, compelling or otherwise.' [*Weber* v. *Aetna Casualty & Surety Co.*, 406 U. S. 164, 176 (1972).]" *Ante*, at 632. (Emphasis added.) This statement might be thought to set the stage for a decision striking down the legislation on the basis of discrimination between legitimates and illegitimates. But the Court then leaves that

issue, finding instead that the statute is unconstitutional because it "discriminate[s] between the two subclasses of afterborn *illegitimates* without any basis for the distinction . . . ." *Ante*, at 636. (Emphasis added.) Whatever may be the rationale for giving some form of stricter scrutiny to classifications between legitimates and illegitimates, that rationale simply vanishes when the alleged discrimination is between classes of illegitimates. Such classifications should instead be evaluated according to the traditional principle set forth in *Dandridge* v. *Williams*, 397 U. S. 471 (1970): "If the classification has some 'reasonable basis,' it does not offend the Constitution simply because the classification 'is not made with mathematical nicety or because in practice it results in some inequality.' " *Id.*, at 485. (Citation omitted.)

The Court's rejection of this principle strongly smacks of due process rather than equal protection concepts. The Court states that "[a]ssuming . . . appellants are in fact dependent on the claimant, it would not serve the purpose of the Act to *conclusively* deny them an opportunity to establish their dependency and their right to insurance benefits," *ante*, at 636 (emphasis added), and indicates that the real problem with the legislation is that it is both "overinclusive" and "underinclusive." According to the Court, the legislation cannot stand because "some children" entitled to benefits "are not dependent on their disabled parent" and because "some illegitimates" who do not get benefits "are, in fact, dependent upon their disabled parent." *Ante*, at 637. In my view this is simply an attack on "irrebuttable presumptions" in another guise. See *Cleveland Board of Education* v. *LaFleur*, 414 U. S. 632 (1974). The very process of making legislative decisions to govern society as a whole means that some individuals will be treated less favorably than other individuals who fall within a different legislative classification.

As THE CHIEF JUSTICE stated only last Term in *Vlandis* v. *Kline*, 412 U. S. 441, 462 (1973) (dissenting opinion): "[L]iterally thousands of state statutes create classifications permanent in duration, which are less than perfect, as all legislative classifications are, and might be improved on by individualized determinations . . . ." This Court should not invalidate such classifications simply out of a preference for different classifications or because an unworkable system of individualized consideration would theoretically be more perfect.

There are also hints in the opinion that the Government failed to build an adequate evidentiary record in support of the challenged classifications. Thus the Court distinguishes *Dandridge* v. *Williams, supra,* a case in which the Court respected the State's allocation of limited resources, by saying: "Here, by contrast, *there is no evidence* supporting the contention that to allow illegitimates in the classification of appellants to receive benefits would significantly impair the federal Social Security trust fund and necessitate a reduction in the scope of persons benefited by the Act." *Ante,* at 633. (Emphasis added.) I should think it obvious that any increase in the number of eligible recipients would serve to additionally deplete a fixed fund, but I find even stranger the notion that the Government must present evidence to justify each and every classification that a legislature chooses to make. If I read the Court's opinion correctly, it would seem to require, for example, that the Government compile evidence to support Congress' determination that Social Security benefits begin at a specified age, perhaps even requiring statistics to show that need is greater (in all cases?) at that age than at lesser ages. This proposition is certainly far removed from traditional principles of deference to legislative judgment. As we stated in *McGowan* v. *Maryland,* 366 U. S. 420, 426

(1961): "A statutory discrimination will not be set aside if any state of facts reasonably may be conceived to justify it." There is nothing in that language that suggests to me that courtrooms should become forums for a second round of legislative hearings whenever a legislative determination is later challenged.

Since I believe that the District Court correctly concluded that the classifications at issue rest upon a rational basis, I dissent.

KOKOSZKA *v.* BELFORD, TRUSTEE IN BANKRUPTCY

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

No. 73-5265. Argued April 22, 1974—Decided June 19, 1974

1. An income tax refund is "property" that passes to the trustee under § 70a (5) of the Bankruptcy Act, being "sufficiently rooted in the bankruptcy past," and not being related conceptually to or the equivalent of future wages for the purpose of giving the bankrupt wage earner a "fresh start." *Lines* v. *Frederick*, 400 U. S. 18, distinguished. Pp. 645–648.

2. The provision in the Consumer Credit Protection Act limiting wage garnishment to no more than 25% of a person's aggregate "disposable earnings" for any pay period does not apply to a tax refund, since the statutory terms "earnings" and "disposable earnings" are confined to periodic payments of compensation and do not pertain to every asset that is traceable in some way to such compensation. Hence, the Act does not limit the bankruptcy trustee's right to treat the tax refund as property of the bankrupt's estate. Pp. 648–652.

479 F. 2d 990, affirmed.

BURGER, C. J., delivered the opinion for a unanimous Court.

Thomas R. Adams argued the cause for petitioner. With him on the briefs were *Joanne S. Faulkner, Joseph Dean Garrison, Jr., Frederick W. Danforth, Jr., John T. Hansen,* and *Michael H. Weiss.*

Benjamin R. Civiletti, by invitation of the Court, 415 U. S. 956, argued the cause as *amicus curiae* in support of the judgment below. With him on the brief was *Harry D. Shapiro.*

MR. CHIEF JUSTICE BURGER delivered the opinion of the Court.

We granted certiorari in this case, 414 U. S. 1091 (1973), to resolve the conflict among the Courts of Ap-

peals on the questions of whether an income tax refund is "property" under § 70a (5) of the Bankruptcy Act [1] and whether, assuming that all or part of such tax refund is property which passes to the trustee, the Consumer Credit Protection Act's [2] limitation on wage garnishment serves to exempt 75% of the refund from the jurisdiction of the trustee.[3]

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[1] The pertinent parts of § 70a (5) of the Bankruptcy Act, 11 U. S. C. § 110 (a)(5), read as follows:

"(a) The trustee of the estate of a bankrupt . . . shall . . . be vested by operation of law with the title of the bankrupt as of the date of the filing of the petition initiating a proceeding under this title . . . to all of the following kinds of property wherever located . . . (5) property, including rights of action, which prior to the filing of the petition he could by any means have transferred or which might have been levied upon and sold under judicial process against him, or otherwise seized, impounded, or sequestered . . . ."

It is undisputed that the refunds could have been transferred under Connecticut law at the time of the filing of the petition, cf. *Segal* v. *Rochelle*, 382 U. S. 375, 381–385 (1966).

[2] 82 Stat. 146, 15 U. S. C. § 1601 *et seq.*

[3] Title 15 U. S. C. § 1673 reads, in pertinent part:

"(a) Maximum allowable garnishment.

"Except as provided in subsection (b) of this section and in section 1675 of this title, the maximum part of the aggregate disposable earnings of an individual for any workweek which is subjected to garnishment may not exceed

"(1) 25 per centum of his disposable earnings for that week, or

"(2) the amount by which his disposable earnings for that week exceed thirty times the Federal minimum hourly wage prescribed by section 206 (a)(1) of Title 29 in effect at the time the earnings are payable,

"whichever is less. In the case of earnings for any pay period other than a week, the Secretary of Labor shall by regulation prescribe a multiple of the Federal minimum hourly wage equivalent in effect to that set forth in paragraph (2).

"(b) Exceptions.

"The restrictions of subsection (a) of this section do not apply in the case of

The petitioner was employed for the first three months of 1971. He was then unemployed from April 1971 until late in December of that year. He was re-employed for about the last week and a half of December 1971. While employed, petitioner claimed two exemptions for federal income tax purposes, the maximum number of deductions to which he was entitled, and his employer withheld the appropriate portion of his wages. 26 U. S. C. § 3402. During the year 1971, petitioner had a gross income of $2,322.

On January 5, 1972, petitioner filed a voluntary petition in bankruptcy. With the exception of a 1962 Corvair automobile which the trustee abandoned as an asset upon the bankrupt's payment of $25, the sole asset claimed by the trustee in bankruptcy was an income tax refund entitlement for $250.90. On February 3, 1972, the referee in bankruptcy entered an *ex parte* order directing petitioner to turn the refund over to the trustee upon its receipt. The bankrupt moved to vacate that order and, after a hearing, the referee denied the motion. In mid-February 1972, petitioner filed his income tax return for the calendar year 1971. Several weeks later, he received his refund check from the Internal Revenue Service. Upon its receipt, petitioner complied with the order of the trustee but filed a petition for review of the referee's decision in the United States District Court.[4] The District Court denied relief. Petitioner was granted

"(1) any order of any court for the support of any person.

"(2) any order of any court of bankruptcy under chapter XIII of the Bankruptcy Act.

"(3) any debt due for any State or Federal tax.

"(c) Execution or enforcement of garnishment order or process prohibited.

"No court of the United States or any State may make, execute, or enforce any order or process in violation of this section."

[4] 11 U. S. C. § 67 (c).

leave to appeal.[5] On May 18, 1973, the United States Court of Appeals for the Second Circuit affirmed the order of the District Court, holding that the tax refund was property within the meaning of § 70a (5) of the Bankruptcy Act and that it therefore vested in the trustee. 479 F. 2d 990. The court further held that the limitations on garnishment contained in the Consumer Credit Protection Act did not apply to bankruptcy situations and that, consequently, the trustee was entitled to the entire refund. Petitioner seeks review of these questions here.

(1)

We turn first to the question of whether petitioner's income tax refund was "property" within the meaning of § 70a (5) of the Bankruptcy Act. The term has never been given a precise or universal definition. On an earlier occasion, in *Segal* v. *Rochelle,* 382 U. S. 375 (1966), the Court noted that " '[i]t is impossible to give any categorical definition to the word "property," nor can we attach to it in certain relations the limitations which would be attached to it in others.' " *Id.,* at 379, quoting *Fisher* v. *Cushman,* 103 F. 860, 864 (CA1 1900). In determining the term's scope—and its limitations—the purposes of the Bankruptcy Act "must ultimately govern." 382 U. S., at 379. See also *Lines* v. *Frederick,* 400 U. S. 18 (1970); *Local Loan Co.* v. *Hunt,* 292 U. S. 234 (1934).

In applying these general considerations to the present situation, there are some guidelines. In *Burlingham* v. *Crouse,* 228 U. S. 459 (1913), for example, the Court stated:

> "It is the twofold purpose of the Bankruptcy Act to convert the estate of the bankrupt into cash and distribute it among creditors and then to give

[5] § 47 (a).

> the bankrupt a fresh start with such exemptions and rights as the statute left untouched." *Id.*, at 473.

See also *Wetmore* v. *Markoe*, 196 U. S. 68, 77 (1904); *Williams* v. *U. S. Fidelity Co.*, 236 U. S. 549, 554–555 (1915); *Stellwagen* v. *Clum*, 245 U. S. 605, 617 (1918). On two rather recent occasions, the Court has applied these general principles to the precise statutory section and to the precise term at issue here. In *Segal* v. *Rochelle*, *supra*, the Court said:

> "The main thrust of § 70a (5) is to secure for creditors everything of value the bankrupt may possess in alienable or leviable form when he files his petition. To this end the term 'property' has been construed most generously and an interest is not outside its reach because it is novel or contingent or because enjoyment must be postponed." 382 U. S., at 379.

At the same time, the Court noted that this construction must be tempered by the intent of Congress "to leave the bankrupt free after the date of his petition to accumulate new wealth in the future," *ibid.*, and thus "make an unencumbered fresh start," *id.*, at 380. Several years later, in *Lines* v. *Frederick*, *supra*, these same considerations were repeated in almost identical language. 400 U. S., at 19. *Segal* and *Lines*, while construing § 70a (5) in almost identical language, reached contrary results. In each case, the Court found the crucial analytical key, not in an abstract articulation of the statute's purpose, but in an analysis of the nature of the asset involved in light of those principles.

In *Segal*, *supra*, this Court held that a business-generated loss carryback tax refund—which was based on prebankruptcy losses but received after bankruptcy—

should pass to the trustee as § 70a (5) property. Balancing the dual purpose of the Bankruptcy Act, see *Burlingham* v. *Crouse, supra,* the Court concluded that the refund was "sufficiently rooted in the prebankruptcy past and so little entangled with the bankrupt's ability to make an unencumbered fresh start that it should be regarded as 'property' under § 70a (5)," 382 U. S., at 380. The Court noted that "the very losses generating the refunds often help precipitate the bankruptcy and injury to the creditors," *id.,* at 378, and that passing the claim to the trustee did not impede a "fresh start." On the contrary, a bankrupt "without a refund claim to preserve has more reason to earn income rather than less." *Id.,* at 380.

In *Lines, supra,* on the other hand, the Court held that vacation pay, accrued prior to the date of filing and collectible either during the plant's annual shutdown for vacation or on the final termination of employment, does not pass to the trustee as § 70a (5) property. As in *Segal, supra,* the Court analyzed the nature of the asset in the light of the dual purposes of the Bankruptcy Act. It concluded that such vacation pay was closely tied to the bankrupt's opportunity to have a " 'clear field for future effort, unhampered by the pressure and discouragement of preexisting debt.' " 400 U. S., at 20, quoting *Local Loan Co.* v. *Hunt, supra,* at 244.

The income tax refund at issue in the present case does not relate conceptually to future wages and it is not the equivalent of future wages for the purpose of giving the bankrupt a "fresh start." The tax payments refunded here were income tax payments withheld from the petitioner prior to his filing for bankruptcy and are based on earnings prior to that filing. Relying on *Lines,* however, petitioner contends that the refund is necessary for a "fresh start" since it is solely derived from wages.

In *Lines*, we described wages as " 'a specialized type of property presenting distinct problems in our economic system' " [6] since they provide the basic means for the "economic survival of the debtor." 400 U. S., at 20.

Petitioner is correct in arguing that both this tax refund and the vacation pay in *Lines* share the common characteristic of being "wage based." It is also true, however, that only the vacation pay in *Lines* was designed to function as a wage substitute at some *future* period and, during that *future* period, to "support the basic requirements of life for [the debtors] and their families . . . ." *Ibid.* This distinction is crucial. As the Court of Appeals noted, since a "tax refund is not the weekly or other periodic income required by a wage earner for his basic support, to deprive him of it will not hinder his ability to make a *fresh* start unhampered by the pressure of preexisting debt," 479 F. 2d, at 995. "Just because some property interest had its source in wages . . . does not give it special protection, for to do so would exempt from the bankrupt estate most of the property owned by many bankrupts, such as savings accounts and automobiles which had their origin in wages." *Ibid.*

We conclude, therefore, that the Court of Appeals correctly held that the income tax refund is "sufficiently rooted in the prebankruptcy past" [7] to be defined as "property" under § 70a (5).

(2)

Our disposition of the first issue requires that we turn next to the petitioner's contention that 75% of the refund is exempt under the provisions of the Consumer

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[6] 400 U. S. 18, 20, quoting *Sniadach* v. *Family Finance Corp.*, 395 U. S. 337, 340 (1969).

[7] *Segal* v. *Rochelle*, 382 U. S., at 380.

Credit Protection Act. The Act provides that no more than 25% of a person's aggregate disposable earnings [8] for any workweek or other pay period may be subject to garnishment. A trustee in bankruptcy takes title to the bankrupt's property "except insofar as it is to property which is held to be exempt . . . ." Bankruptcy Act, § 70a, 11 U. S. C. § 110 (a). Another section provides that the Act "shall not affect the allowance to bankrupts of the exemptions which are prescribed by the laws of the United States . . . ." Bankruptcy Act § 6, 11 U. S. C. § 24. Petitioner argues that the Consumer Credit Protection Act's restrictions on garnishment, 15 U. S. C. § 1671 *et seq.*, are such an exemption. In essence, the petitioner's position is that a tax refund, having its source in wages and being completely available to the taxpayer upon its return without any further deduction, is "disposable earnings" within the meaning of the statute. 15 U. S. C. § 1672 (b). He further argues that the taking of custody by the trustee is a "garnishment" since a bankruptcy proceeding is a "legal or equitable procedure through which the earnings of any individual are required to be withheld for payment of any debt." § 1672 (c).

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[8] Title 15 U. S. C. § 1672, entitled "Definitions," states:

"For the purpose of this subchapter:

"(a) The term 'earnings' means compensation paid or payable for personal services, whether denominated as wages, salary, commission, bonus, or otherwise, and includes periodic payments pursuant to a pension or retirement program.

"(b) The term 'disposable earnings' means that part of the earnings of any individual remaining after the deduction from those earnings of any amounts required by law to be withheld.

"(c) The term 'garnishment' means any legal or equitable procedure through which the earnings of any individual are required to be withheld for payment of any debt."

The Congress did not enact the Consumer Credit Protection Act in a vacuum. The drafters of the statute were well aware that the provisions and the purposes of the Bankruptcy Act and the new legislation would have to coexist. Indeed, the Consumer Credit Protection Act explicitly rests on both the bankruptcy and commerce powers of the Congress. 15 U. S. C. § 1671 (b). We must therefore take into consideration the language and purpose of both the Bankruptcy Act and the Consumer Credit Protection Act in assessing the validity of the petitioner's argument. When "interpreting a statute, the court will not look merely to a particular clause in which general words may be used, but will take in connection with it the whole statute (or statutes on the same subject) and the objects and policy of the law, as indicated by its various provisions, and give to it such a construction as will carry into execution the will of the Legislature . . . ." *Brown* v. *Duchesne,* 19 How. 183, 194 (1857).

An examination of the legislative history of the Consumer Protection Act makes it clear that, while it was enacted against the background of the Bankruptcy Act, it was not intended to alter the clear purpose of the latter Act to assemble, once a bankruptcy petition is filed, all of the debtor's assets for the benefit of his creditors. See, *e. g., Segal* v. *Rochelle,* 382 U. S. 375 (1966). Indeed, Congress' concern was not the *administration* of a bankrupt's estate but the *prevention* of bankruptcy in the first place by eliminating "an essential element in the predatory extension of credit resulting in a disruption of employment, production, as well as consumption" [9] and a consequent increase in personal bankruptcies. Noting that the evidence before the Committee "clearly established a causal connection between harsh

[9] H. R. Rep. No. 1040, 90th Cong., 1st Sess., 20 (1967).

garnishment laws and high levels of personal bankruptcies," [10] the House Report concluded:

> "The limitations on the garnishment of wages adopted by your committee, while permitting the continued orderly payment of consumer debts, will relieve countless honest debtors driven by economic desperation from plunging into bankruptcy in order to preserve their employment and insure a continued means of support for themselves and their families." H. R. Rep. No. 1040, 90th Cong., 1st Sess., 21 (1967).

See also *id.*, at 7. In short, the Consumer Credit Protection Act sought to prevent consumers from entering bankruptcy in the first place. However, if, despite its protection, bankruptcy did occur, the debtor's protection and remedy remained under the Bankruptcy Act.

The Court of Appeals held that the terms "earnings" and "disposable earnings," as used in 15 U. S. C. §§ 1672, 1673, did not include a tax refund, but were limited to "periodic payments of compensation and [do] not pertain to every asset that is traceable in some way to such compensation." 479 F. 2d, at 997. This view is fully supported by the legislative history. There is every indication that Congress, in an effort to avoid the necessity of bankruptcy, sought to regulate garnishment in its usual sense as a levy on periodic payments of compensation needed to support the wage earner and his family on a week-to-week, month-to-month basis. There is no indication, however, that Congress intended drastically to alter the delicate balance of a debtor's protections and obligations during the bankruptcy procedure.[11] We

[10] *Id.*, at 20–21.

[11] Petitioner argues that, since Chapter XIII of the Bankruptcy Act had been explicitly excluded from the scope of the Consumer Credit Protection Act (see 15 U. S. C. § 1673 (b)), it must have

therefore agree with the Court of Appeals that the Consumer Credit Protection Act does not restrict the right of the trustee to treat the income tax refund as property of the bankrupt's estate. Accordingly, the judgment of the Court of Appeals is affirmed.

It is so ordered.

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intended to include the other portions of the Bankruptcy Act. Chapter XIII permits a wage earner to satisfy his creditors out of future income under a supervised plan. This particular procedure resembles the normal credit situation to which the CCPA is directed more than other bankruptcy situations and, for this reason, Congress might well have felt it necessary to ensure that the CCPA was not enforced at the expense of the bankruptcy procedures.

Syllabus

WARDEN, LEWISBURG PENITENTIARY *v.* MARRERO

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 73-831. Argued April 29, 1974—Decided June 19, 1974

The Comprehensive Drug Abuse Prevention and Control Act of 1970, which became effective May 1, 1971, makes parole under the general parole statute, 18 U. S. C. § 4202, available for almost all narcotics offenders. Respondent, who had been sentenced before May 1, 1971, and was ineligible for parole under 26 U. S. C. § 7237 (d), which was repealed by the 1970 Act, sought habeas corpus in the District Court, claiming parole eligibility when one-third of his sentence had been served. The District Court denied relief on the ground that the prohibition on parole eligibility under 26 U. S. C. § 7237 (d) had been preserved by § 1103 (a) of the 1970 statute (which provides that "[p]rosecutions" for violations before May 1, 1971, shall not be affected by repeals of statutory provisions) and by the general saving clause, 1 U. S. C. § 109 (which provides that "[t]he repeal of any statute shall not have the effect to release or extinguish any penalty, forfeiture, or liability incurred under such statute . . ."). The Court of Appeals reversed. *Held:*

1. Section 1103 (a) of the 1970 statute bars the Board of Parole from considering respondent for parole under 18 U. S. C. § 4202, since parole eligibility, as a practical matter, is determined at the time of sentencing, and sentencing is a part of the concept of "prosecution," saved by § 1103 (a), *Bradley* v. *United States*, 410 U. S. 605. Pp. 657-659.

2. The Board of Parole is also barred by the general saving clause from considering respondent for parole, since it is clear that Congress intended ineligibility for parole in § 7237 (d) to be treated as part of the offender's "punishment," and therefore the prohibition against the offender's eligibility for parole under 18 U. S. C. § 4202 is a "penalty, forfeiture, or liability" under the saving clause. Pp. 659-664.

483 F. 2d 656, reversed.

BRENNAN, J., delivered the opinion of the Court, in which BURGER, C. J., and STEWART, WHITE, POWELL, and REHNQUIST, JJ., joined. BLACKMUN, J., filed a dissenting opinion, in which DOUGLAS and MARSHALL, JJ., joined, *post*, p. 664.

Deputy Solicitor General Lafontant argued the cause for petitioner. With her on the brief were *Solicitor General Bork, Assistant Attorney General Petersen, Harriet S. Shapiro,* and *Jerome M. Feit.*

John J. Witmeyer III, by appointment of the Court, 416 U. S. 979, argued the cause for respondent *pro hac vice.* With him on the brief were *Stewart Dalzell* and *Harry C. Batchelder, Jr.**

MR. JUSTICE BRENNAN delivered the opinion of the Court.

A now-repealed statute, 26 U. S. C. § 7237 (d),[1] provided, *inter alia,* that certain narcotics offenders sentenced to mandatory minimum prison terms should be ineligible for parole under the general parole statute, 18 U. S. C.

**Joseph Onek* and *Ann K. Macrory* filed a brief for the Washington Lawyers' Committee for Civil Rights Under Law as *amicus curiae* urging affirmance.

[1] Title 26 U. S. C. § 7237 (d) (1964 ed. and Supp. V) provided:

"Upon conviction—

"(1) of any offense the penalty for which is provided in subsection (b) of this section, subsection (c), (h), or (i) of section 2 of the Narcotic Drugs Import and Export Act, as amended, or such Act of July 11, 1941, as amended, or

"(2) of any offense the penalty for which is provided in subsection (a) of this section, if it is the offender's second or subsequent offense,

"the imposition or execution of sentence shall not be suspended, probation shall not be granted, section 4202 of title 18 of the United States Code shall not apply, and the Act of July 15, 1932 (47 Stat. 696; D. C. Code 24–201 and following), as amended, shall not apply."

§ 4202.[2] Section 7237 (d) was repealed, effective May 1, 1971, 84 Stat. 1292, by the Comprehensive Drug Abuse Prevention and Control Act of 1970, which makes parole under § 4202 available for almost all narcotics offenders. The question for decision in this case is whether the parole ineligibility provision of 26 U. S. C. § 7237 (d) survives the repealer, so that a narcotics offender who has served more than one-third of a sentence imposed before May 1, 1971, remains ineligible for parole consideration under 18 U. S. C. § 4202.

Respondent was convicted of narcotics offenses and, as a second offender, was sentenced before May 1, 1971, to concurrent terms of 10 years' imprisonment on each of two counts. 450 F. 2d 373, 374–375 (CA2 1971).[3] On February 24, 1972, respondent sought habeas corpus in the United States District Court for the Middle District of Pennsylvania, claiming that, since 26 U. S. C. § 7237 (d) had been repealed, he should be eligible for consideration for parole under 18 U. S. C. § 4202 when one-third of his sentence had been served. The District Court denied relief on the ground that the prohibition on parole eligibility of 26 U. S. C. § 7237 (d)

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[2] Title 18 U. S. C. § 4202 provides:

"A Federal prisoner, other than a juvenile delinquent or a committed youth offender, wherever confined and serving a definite term or terms of over one hundred and eighty days, whose record shows that he has observed the rules of the institution in which he is confined, may be released on parole after serving one-third of such term or terms or after serving fifteen years of a life sentence or of a sentence of over forty-five years."

[3] Respondent was convicted of violating 21 U. S. C. § 173 (1964 ed.) and 26 U. S. C. §§ 4701, 4703, 4704 (a), and 4771 (a) (1964 ed.). His sentences were imposed under 21 U. S. C. § 174 and 26 U. S. C. § 7237 (a). Section 174 explicitly incorporated the provisions of 26 U. S. C. § 7237 (d), which was directly applicable to the sentence imposed under § 7237 (a).

had been preserved by § 1103 (a) of the 1970 statute [4] and by 1 U. S. C. § 109.[5] 347 F. Supp. 99. The Court of Appeals for the Third Circuit reversed, holding that neither § 1103 (a) of the 1970 statute nor 1 U. S. C. § 109 continued the prohibition on eligibility for parole consideration in 26 U. S. C. § 7237 (d). 483 F. 2d 656 (1973).[6] We granted certiorari to resolve a conflict among the Courts of Appeals.[7] 414 U. S. 1128 (1974). We agree with the District Court and reverse the judgment of the Court of Appeals.

Bradley v. *United States*, 410 U. S. 605, 611 (1973), expressly reserved decision of the question now before us.

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[4] Section 1103 (a) provides:

"Prosecutions for any violation of law occurring prior to the effective date of [the Act] shall not be affected by the repeals or amendments made by [it] . . . or abated by reason thereof."

[5] Title 1 U. S. C. § 109 provides in relevant part:

"The repeal of any statute shall not have the effect to release or extinguish any penalty, forfeiture, or liability incurred under such statute, unless the repealing Act shall so expressly provide, and such statute shall be treated as still remaining in force for the purpose of sustaining any proper action or prosecution for the enforcement of such penalty, forfeiture, or liability."

[6] The mandate was issued before the Circuit Justice signed a stay. The stay was treated, however, as staying all proceedings under the mandate. Respondent's motion to dismiss the writ of certiorari as moot is therefore denied.

[7] The Courts of Appeals for the Second and Tenth Circuits have held that narcotics offenders are ineligible for parole. *United States* v. *De Simone*, 468 F. 2d 1196 (CA2 1972) (but see *United States* v. *Huguet*, 481 F. 2d 888 (CA2 1973)); *Perea* v. *United States Board of Parole*, 480 F. 2d 608 (CA10 1973). In addition to the Court of Appeals for the Third Circuit, in this case, the Courts of Appeals for the Fourth, Fifth, Seventh, and District of Columbia Circuits have held that narcotics offenders are eligible for parole. See *Alvarado* v. *McLaughlin*, 486 F. 2d 541 (CA4 1973); *Amaya* v. *United States Board of Parole*, 486 F. 2d 940 (CA5 1973); *United States* v. *McGarr*, 461 F. 2d 1 (CA7 1972); *United States* v. *Marshall*, 158 U. S. App. D. C. 283, 485 F. 2d 1062 (1973).

Bradley involved the conviction and sentencing after May 1, 1971, of offenders who committed narcotics offenses before that date. We held that sentencing is a part of the concept of "prosecution" and therefore that the provision of § 1103 (a) of the 1970 Act that "[p]rosecutions for any violation of law occurring [before May 1, 1971] shall not be affected" by the repeal of 26 U. S. C. § 7237 (d), barred the sentencing judge from suspending the sentences of, or granting probation to, the *Bradley* petitioners and also barred him from making them eligible for early parole, before they had served one-third of their sentences, under 18 U. S. C. § 4208 (a).[8] Although stating in a footnote that "[t]he decision to grant parole under [18 U. S. C.] § 4202 lies with the Board of Parole, not with the District Judge, and must be made long after sentence has been entered and the prosecution terminated," we concluded that "[w]hether § 1103 (a) or the general saving statute, 1 U. S. C. § 109, limits that decision is a question we cannot consider in this case." 410 U. S., at 611 n. 6.

I

We hold that § 1103 (a) bars the Board of Parole from considering respondent for parole under 18 U. S. C.

[8] Title 18 U. S. C. § 4208 (a) provides:

"(a) Upon entering a judgment of conviction, the court having jurisdiction to impose sentence, when in its opinion the ends of justice and best interests of the public require that the defendant be sentenced to imprisonment for a term exceeding one year, may (1) designate in the sentence of imprisonment imposed a minimum term at the expiration of which the prisoner shall become eligible for parole, which term may be less than, but shall not be more than one-third of the maximum sentence imposed by the court, or (2) the court may fix the maximum sentence of imprisonment to be served in which event the court may specify that the prisoner may become eligible for parole at such time as the board of parole may determine."

§ 4202. In concluding in *Bradley* that ineligibility for early parole under 18 U. S. C. § 4208 (a) was part of the "prosecution," we reasoned that, since a District Judge's decision to make an offender eligible for early parole is made at the time of entering a judgment of conviction, the decision was part of the sentence and therefore also part of the "prosecution." 410 U. S., at 611.

Similarly, a pragmatic view of sentencing requires the conclusion that parole eligibility under 18 U. S. C. § 4202 is also determined at the time of sentence. Since, under § 4202, an offender becomes eligible for parole after serving one-third of his sentence, see n. 2, *supra,* parole eligibility is a function of the length of the sentence fixed by the district judge. Although, of course, the precise time at which the offender becomes eligible for parole is not part of the sentence, as it is in the case of § 4208 (a), it is implicit in the terms of the sentence. And because it could not be seriously argued that sentencing decisions are made without regard to the period of time a defendant must spend in prison before becoming eligible for parole, or that such decisions would not be drastically affected by a substantial change in the proportion of the sentence required to be served before becoming eligible, parole eligibility can be properly viewed as being determined—and deliberately so—by the sentence of the district judge. Eligibility for parole under § 4202 is thus determined at the time of sentencing and, under the teaching of *Bradley,* is part of the "prosecution" saved by § 1103 (a).

We therefore reject respondent's argument that our *Bradley* footnote should be read as holding that, because the decision to grant parole under § 4202 is for the Board of Parole, not the trial judge, and is arrived at after the sentence has been entered and the prosecution has come to an end, the parole eligibility decision is not part of the "prosecution" for purposes of § 1103 (a). Apart from

the obvious answer that the Court could not reasonably be thought to have decided in a footnote a question "on which" we said in the text, "we express no opinion," 410 U. S., at 611, respondent's reliance upon the footnote both proves too little and too much. It proves too little, because the fact that the Board of Parole, not the sentencing judge, finally determines whether and when an offender should be released on parole does not undercut our conclusion that the district judge, at the time of sentencing, determines when the offender will become *eligible* for consideration for parole and the Board's action simply implements that determination.[9] It proves too much, because, if—as the respondent would have it—the proper focus is upon the time at which release on parole is actually granted or denied, the parole decision, whether made under 18 U. S. C. § 4208 (a) or 18 U. S. C. § 4202, is made long after the "prosecution" terminates; for under both provisions, the Board of Parole ultimately decides whether and when the offender is to be released. But, as previously mentioned, we held in *Bradley* that the district judge's decision to deny early parole under § 4208 (a) was part of the sentence, and therefore part of the "prosecution."

II

We hold further that the general saving clause, 1 U. S. C. § 109, also bars the Board of Parole from considering respondent for parole.[10]

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[9] The statement in *Morrissey* v. *Brewer*, 408 U. S. 471, 480 (1972), that "[p]arole arises after the end of the criminal prosecution, including imposition of sentence" was addressed to the decision determining the time of *release* on parole as distinguished from the decision determining *eligibility*.

[10] Respondent argues that, since the 1970 Act contains its own saving clause, § 1103 (a), that specific directive should be read to supersede the general clause § 109. But only if § 1103 (a) can be said

Congress enacted its first general saving provision, c. 71, 16 Stat. 432 (1871), to abolish the common-law presumption that the repeal of a criminal statute resulted in the abatement of "all prosecutions which had not reached final disposition in the highest court authorized to review them." *Bradley* v. *United States*, 410 U. S., at 607; see *Bell* v. *Maryland*, 378 U. S. 226, 230 (1964). Common-law abatements resulted not only from unequivocal statutory repeals, but also from repeals and re-enactments with different penalties, whether the re-enacted legislation increased or decreased the penalties. See *Bradley* v. *United States*, *supra*, at 607–608; *Lindzey* v. *State*, 65 Miss. 542, 5 So. 99 (1888); *Hartung* v. *People*, 22 N. Y. 95 (1860); Comment, Today's Law and Yesterday's Crime: Retroactive Application of Ameliorative Criminal Legislation, 121 U. Pa. L. Rev. 120, 121–126 (1972). To avoid such abatements—often the product of legislative inadvertence—Congress enacted 1 U. S. C. § 109, the general saving clause, which provides in pertinent part that "[t]he repeal of any statute shall not have the effect to release or extinguish any penalty, forfeiture, or liability incurred under such statute." See n. 5, *supra*. The determinative question is thus whether the prohibition of 26 U. S. C. § 7237 (d) against the offender's eligibility for parole under 18 U. S. C. § 4202 is a "penalty, forfeiture, or liability" saved from release or extinguishment by 1 U. S. C. § 109.[11]

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by fair implication or expressly to conflict with § 109 would there be reason to hold that § 1103 (a) superseded § 109. See *Great Northern R. Co.* v. *United States*, 208 U. S. 452, 465–466 (1908). We find no conflict.

[11] The Court of Appeals, relying on statements in opinions of this Court that § 109 is intended to obviate "mere technical abatement[s]," see *Hamm* v. *Rock Hill*, 379 U. S. 306, 314 (1964), held that, since respondent's conviction and sentence would remain intact even if he were released on parole, the purposes of 1 U. S. C. § 109 would

United States v. *Reisinger,* 128 U. S. 398 (1888), held that the saving clause's use of the words "penalty," "liability," and "forfeiture" required the conclusion that the clause covered criminal statutes. Those words, the Court found, were "used by the great masters of crown law and the elementary writers as synonymous with the word 'punishment,' in connection with crimes of the highest grade." *Id.,* at 402. Thus, the Court agreed with the construction of the clause by Mr. Justice Miller, as Circuit Justice, in *United States* v. *Ulrici,* 28 F. Cas. 328, 329 (No. 16,594) (CCED Mo. 1875), that those terms "were used by Congress to include all forms of punishment for crime." See 128 U. S., at 402–403. In consequence, the saving clause has been held to bar application of ameliorative criminal sentencing laws repealing harsher ones in force at the time of the commission of an offense. See, *e. g., Jones* v. *United States,* 117 U. S. App. D. C. 169, 327 F. 2d 867 (1963); *United States* v. *Kirby,* 176 F. 2d 101 (CA2 1949); *Lovely* v. *United States,* 175 F. 2d 312 (CA4 1949).

Although the general saving clause does not ordinarily preserve discarded remedies or procedures, see *Hertz* v. *Woodman,* 218 U. S. 205, 218 (1910); *United States* v. *Obermeier,* 186 F. 2d 243, 253 (CA2 1950), the legislative

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not be served by applying it to save the no-parole provision of 26 U. S. C. § 7237 (d). 483 F. 2d 656, 663; see *United States* v. *Stephens,* 449 F. 2d 103, 105–106 (CA9 1971). This analysis, it seems to us, begs the relevant question. The no-parole provision of 26 U. S. C. § 7237 (d) was directly incorporated into the sentencing provisions of 21 U. S. C. § 174 and 26 U. S. C. § 7237 (a), see n. 3, *supra,* and if the repeal of 26 U. S. C. § 7237 (d) can be viewed as mitigating respondent's punishment under those sections, his conviction and sentence would not be left intact by the repealer and his prosecution would "technically" abate under the common-law rule. Thus, the appropriate inquiry is whether parole ineligibility is a "penalty, forfeiture, or liability" for his offense that survives the repealer.

history of § 7237 (d) reveals that Congress meant ineligibility for parole to be treated as part of the "punishment" for the narcotics offenses for which respondent was convicted. Section 7237 (d) was enacted as part of the Narcotic Control Act of 1956. The statute embodied congressional acceptance of the approach that effective combat against the contagion of drug addiction required the imposition of severe penalties for certain narcotics offenses. Congress therefore enacted lengthy mandatory minimum sentences as a means of decreasing both drug addiction and trafficking. See, *e. g.*, S. Rep. No. 1997, 84th Cong., 2d Sess., 5 (1956); H. R. Rep. No. 2388, 84th Cong., 2d Sess., 10 (1956). But Congress believed that longer sentences would not achieve the desired results unless the offender remained imprisoned for his full term.

> "In evaluating the effectiveness of the presently prescribed penalties, it must be recognized that special incentives in our penal system serve to decrease the actual time spent in a penal institution under a sentence imposed by a court. The violator is eligible for parole after serving one-third of his sentence. . . . Available data from the Bureau of Prisons, indicates that a narcotics violator actually serves an average of less than two-thirds of the sentence imposed by the court. This mitigation of sentence tends to defeat the purposes of [existing legislation] . . . ." *Id.*, at 10–11.

Accordingly, Congress expressly provided in § 7237 (d) that parole under 18 U. S. C. § 4202 would be unavailable for narcotics offenders.

There are additional reasons for believing that the no-parole provision is an element of respondent's "punishment." First, only an unusual prisoner could be expected to think that he was not suffering a penalty when he was denied eligibility for parole. See *United States* v. *Ross*,

464 F. 2d 376, 379 (CA2 1972); *United States* v. *De Simone*, 468 F. 2d 1196, 1199 (CA2 1972). For the confined prisoner, parole—even with its legal constraints—is a long step toward regaining lost freedom.[12] An observation made in somewhat different context is apt:

> "It may be 'legislative grace' for Congress to provide for parole but when it expressly removes all hope of parole upon conviction and sentence for certain offences, . . . this is in the nature of an additional penalty." *Durant* v. *United States*, 410 F. 2d 689, 691 (CA5 1969).

Second, a repealer of parole eligibility previously available to imprisoned offenders would clearly present the serious question under the *ex post facto* clause of Art. I, § 9, cl. 3, of the Constitution, of whether it imposed a "greater or more severe *punishment* than was prescribed by law at the time of the . . . offense," *Rooney* v. *North Dakota*, 196 U. S. 319, 325 (1905) (emphasis added). See *Love* v. *Fitzharris*, 460 F. 2d 382 (CA9 1972); cf. *Lindsey* v. *Washington*, 301 U. S. 397 (1937); *Holden* v. *Minnesota*, 137 U. S. 483, 491–492 (1890); *Calder* v. *Bull*, 3 Dall. 386, 390 (1798); *United States ex rel. Umbenhowar* v. *McDonnell*, 11 F. Supp. 1014 (ND Ill. 1934).

Thus, at least where, as in the case of respondent's narcotics offenses, Congress has barred parole eligibility

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[12] In *Morrissey* v. *Brewer*, 408 U. S., at 482, in determining that parole may not be revoked without affording the parolee procedural due process, we observed:

"The liberty of a parolee enables him to do a wide range of things open to persons who have never been convicted of any crime. . . . Subject to the conditions of his parole, he can be gainfully employed and is free to be with family and friends and to form the other enduring attachments of normal life. Though the State properly subjects him to many restrictions not applicable to other citizens, his condition is very different from that of confinement in a prison." (Footnote omitted.)

as a punitive measure, we hold that the no-parole provision of § 7237 (d) is a "penalty, forfeiture, or liability" saved by § 109.

III

Respondent emphasizes that Congress completely changed its approach to regulation of narcotics offenses in the 1970 Act, jettisoning the retributive approach of the 1956 law in favor of emphasis in the 1970 Act upon rehabilitation of the narcotics offender. He argues that, in light of this basic change, little purpose is served by denying respondent eligibility for parole, indeed that such denial frustrates the current congressional goal of rehabilitating narcotics offenders.

Undeniably this argument has force, but it is addressed to the wrong governmental branch. Punishment for federal crimes is a matter for Congress, subject to judicial veto only when the legislative judgment oversteps constitutional bounds. See *Gore* v. *United States*, 357 U. S. 386, 393 (1958); *Bell* v. *United States*, 349 U. S. 81, 82 (1955). Section 1103 (a) of the 1970 Act and 1 U. S. C. § 109 saved from repeal the bar of parole eligibility under § 7237 (d), and, however severe the consequences for respondent, Congress trespassed no constitutional limits.

The judgment of the Court of Appeals is

Reversed.

MR. JUSTICE BLACKMUN, with whom MR. JUSTICE DOUGLAS and MR. JUSTICE MARSHALL join, dissenting.

The Court holds that the no-parole provision of the repealed statute, 26 U. S. C. § 7237 (d) (1964 ed. and Supp. V), is saved by both the general saving clause, 1 U. S. C. § 109, and the specific saving clause, § 1103 (a), of the 1970 Act. I believe that neither provision can be read to cover postsentencing parole eligibility and I therefore respectfully dissent.

I

Section 109. Parole eligibility, in my view, is not a "penalty" envisioned by, and within the meaning of, the general saving statute, 1 U. S. C. § 109. The purpose and thrust of § 109, the pertinent portion of which was enacted originally in 1871, c. 71, 16 Stat. 432, is to preclude the technical abatement of a prosecution for an offense that was committed before the criminal statute was repealed. *Hamm* v. *Rock Hill,* 379 U. S. 306, 314 (1964). Quite appropriately, this recognizes that, apart from exceptional circumstances,[1] one who violates the criminal law should not escape sanction if, subsequent to the commission of his criminal act, the law happens to be repealed.

This saving statute, however, is not in line with the traditional common-law rule favoring application of existing law. *United States* v. *Chambers,* 291 U. S. 217 (1934); *United States* v. *Tynen,* 11 Wall. 88 (1871). See *United States* v. *Schooner Peggy,* 1 Cranch 103 (1801); *Bradley* v. *Richmond School Board,* 416 U. S. 696 (1974). The statute has never been applied by this Court other than to prevent technical abatement of a prosecution.[2] Those federal courts that have interpreted the statute's reference to "penalty" to include the terms of the sentence have dealt only with the length of the sentence actually imposed. *United States* v. *Kirby,* 176 F. 2d 101 (CA2 1949); *Lovely* v. *United*

[1] See, *e. g., Hamm* v. *Rock Hill,* 379 U. S. 306 (1964).

[2] The issue certified and decided in *United States* v. *Reisinger,* 128 U. S. 398 (1888), was only whether a prosecution under a repealed criminal statute survived the repeal. "Penalty" appears to have been used there interchangeably with the concept of criminal liability. See also *United States* v. *Smith,* 433 F. 2d 341 (CA4 1970), cert. denied, 401 U. S. 942 (1971); *United States* v. *Brown,* 429 F. 2d 566 (CA5 1970); *Faubion* v. *United States,* 424 F. 2d 437 (CA10 1970).

States, 175 F. 2d 312 (CA4), cert. denied, 338 U. S. 834 (1949); *Duffel* v. *United States*, 95 U. S. App. D. C. 242, 221 F. 2d 523 (1954); *Maceo* v. *United States*, 46 F. 2d 788 (CA5 1931).[3]

In this case, however, we are faced with a decidedly different situation. Respondent Marrero in no way is seeking to avoid punishment for his criminal act, and he is still fully subject to the service of his sentence. What Marrero seeks is merely the opportunity to be *considered* for parole. Eligibility for parole will not free him from his imposed sentence. The decision whether he should be accorded parole lies within the discretion of the Board of Parole. If for any reason the Board feels that parole would not be appropriate for the respondent, it can be denied, and Marrero will remain incarcerated for the term to which he is subject. Moreover, even if parole is deemed appropriate and is granted, respondent still would be subject to the conditions the parole authorities choose to place on his conditional freedom.

As the Fourth Circuit aptly has observed, parole "is not a release of the prisoner from all disciplinary restraint but is rather merely 'an extension of the prison walls'; and the prisoner while on parole remains 'in the legal custody and under the control of' the Parole Board," *United States ex rel. Rowe* v. *Nicholson*, 78 F. 2d 468, 469–470, cert. denied, 296 U. S. 573 (1935); *Alvarado* v. *McLaughlin*, 486 F. 2d 541, 544 (1973). See also

[3] In *Kirby* and *Lovely* the Courts of Appeals construed the general saving clause in connection with repealing statutes' saving clauses that provided for the nonabatement of any "rights and liabilities" under the repealed acts. It is interesting to note that all the cases cited by the Court, *ante*, at 661, and petitioner, Brief for Petitioner 16–17, for the proposition that sentence as well as prosecution survives under the general saving clause, were decided in circuits that subsequently rejected the extension sought by petitioner in the present case.

United States v. *Marshall*, 158 U. S. App. D. C. 283, 286, 485 F. 2d 1062, 1065 (1973). The "sentence" to be served by respondent is still 10 years, whether or not he is granted parole. Cf. *Anderson* v. *Corall*, 263 U. S. 193 (1923). In short, it is by no means clear to me that respondent Marrero is seeking to be relieved of the obligations of the "sentence" imposed upon him.

By expanding the term "penalty" to include parole ineligibility, rather than restricting it to the sentence imposed, the Court, in my view, misconceives the nature of parole ineligibility and extends § 109 well beyond its prior limits. To say that Congress intended parole ineligibility to be a "penalty" under the repealed statute is merely to state the conclusion. The appropriate question is whether Congress intended parole ineligibility to be the type of "penalty" preserved by the general saving statute. Until today, § 109 has not been read so broadly, and I believe this extension goes beyond the intended narrow anti-abatement reach of § 109. To repeat: § 109 "was meant to obviate mere technical abatement." *Hamm* v. *Rock Hill*, 379 U. S., at 314.

This unprecedented extension of § 109 might be justified, and perhaps made acceptable, if it were possible in any way to conclude that the Court's reading serves to effectuate congressional intent or to promote some valid policy. But the result reached clearly does a disservice in both respects.

As is demonstrated in Part II, *infra*, Congress did not affirmatively intend to save the no-parole provision. And on pure policy grounds, the result reached by the Court is wholly illogical. Presumably, the purposes behind parole ineligibility are to effect a deterrence to the commission of narcotics offenses, and to keep serious drug offenders behind bars for longer periods. By repealing the parole ineligibility provision, Congress rejected any deterrence

rationale that had existed. A person who, on or subsequent to May 1, 1971, might anticipate the commission of a drug offense and who is cognizant of the law, knows that he is eligible for parole under 18 U. S. C. § 4202 after service of one-third of his more-than-180-day sentence. The anomalous effect of the Court's action is that it keeps an inmate who is convicted of an offense committed on April 30, 1971, incarcerated for the full length of his term, while his fellow inmate who committed the identical crime on May 2 and who behaved identically in prison, is eligible for release after one-third the time. Surely, disparate treatment of this kind serves only to frustrate the inmate's sense of justice and to undermine whatever rehabilitative attempts currently are being made.[4]

II

Section 1103 (a). In passing the Comprehensive Drug Abuse Prevention and Control Act of 1970, 84 Stat. 1236, with its specific repealer provisions in §§ 1101 (b)(3)(A) and (b)(4)(A), Congress unequivocally withdrew and rejected the concept of parole ineligibility. It concluded that the criminal process is ill served by a law that removes the incentives and the rehabilitative potential of a parole system. The only reference in the 1970 Act to pre-Act offenders is in the saving provision of § 1103 (a), 84

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[4] Petitioner concedes that granting parole eligibility presents no institutional problems.

"Neither the Bureau of Prisons nor the Board of Parole believes that it would impede the proper performance of their functions if they were required to consider narcotics offenders convicted under the prior statute eligible for parole under 18 U. S. C. 4202. Such a requirement would not demand the granting of parole to any individual prisoner unless the Board determines that his supervised release from confinement is in the interests of both the prisoner and society." Brief for Petitioner 8.

Stat. 1294, and it precludes abatement only of "prosecutions." Although we pretermitted this precise question in *Bradley* v. *United States*, 410 U. S. 605, 611 n. 6 (1973), the Court clearly distinguished postsentence parole eligibility from the specific terms of the sentence already handed down. I believe this distinction is crucial and that it requires a different result in the instant situation.

In determining whether § 1103(a) bars parole eligibility for pre-Act offenders, the Court should ascertain what Congress intended. While there is no precise legislative history on this question, I think the wording of § 1103(a) and the overall purposes of the 1970 Act preclude the result reached by the Court. Section 1103(a) applies only to "prosecutions." We reached the outer limit of this term in *Bradley*. Certainly the legislative and judicial history of the even broader language of the general saving provision, § 109, hardly supports the extravagant interpretation of § 1103 (a) reached today. In light of the clear history and law under § 109, had Congress wanted to save more than the prosecution itself, it could well have done so in specific terms. Instead, it chose the narrowest possible saving clause. Particularly in light of the fact that the text of the 1970 Act specifically rejects the concept of paroleless sentencing, it is illogical and unwarranted to assume that Congress intended the term "prosecutions" to be read so broadly.

For me there is no ambiguity in § 1103 (a). I would take the limited saving clause at its word. Assuming, *arguendo*, that there is some doubt as to the congressional intent, it is harsh, to say the least, to resolve the doubt in the manner chosen by the Court. In light of the general rule favoring application of existing law, *United States* v. *Chambers*, 291 U. S. 217 (1934), and the general rule favoring construction of ambiguous statutes in favor of criminal defendants, *United States* v. *Bass*, 404 U. S. 336

(1971), I see no other choice than to resolve any doubts in favor of eligibility.

The Court would justify its broad reading of the word "prosecution" by stating that "a pragmatic view of sentencing requires [this] conclusion." *Ante*, at 658. Needless to say, no authority, legal or otherwise, is cited for this proposition other than the majority's own intuition, and I venture to say that none could be cited. Parole eligibility is determined by a parole board at *its* discretion, and the existence of parole eligibility is either guaranteed by statute or, as in the case of the repealed Act, is denied by statute. One thing is clear: the sentencing judge has no explicit control over the determination. Congress has never instructed district courts to assess sentences according to parole eligibility dates and if in fact some judges do this, it hardly justifies this Court's flat conclusion that parole eligibility is "implicit in the terms of the sentence" and is "thus determined at the time of sentencing." *Ibid.*

Whatever else *Bradley* held, it clearly stated that the parole eligibility determination under 18 U. S. C. § 4202 (as opposed to preclusion of early parole in the terms of the sentence, as in *Bradley*) does not lie with the district judge, and the determination is *"made long after sentence has been entered and the prosecution terminated."* 410 U. S., at 611 n. 6 (emphasis added).[5] Even assuming footnote 6 in *Bradley* did not conclusively decide the instant issue, the Court's opinion renders the words of

[5] As the Court notes, *ante*, at 659 n. 9, in *Morrissey* v. *Brewer*, 408 U. S. 471, 480 (1972), we stated that "[p]arole arises after the end of the criminal prosecution, including imposition of the sentence." The fact that the decision might have dealt with release rather than the determination of eligibility does not eliminate the conceptual proposition that parole eligibility is an event separate from sentencing, and I feel that the majority's attempted distinction is not persuasive.

the footnote a nullity. The majority states that we "could not reasonably be thought to have decided in a footnote a question 'on which' we said in the text, 'we express no opinion,' " *ante*, at 659. It then goes on to decide that very issue, relying almost entirely on *Bradley* and concluding that "under the teaching of *Bradley*" ineligibility for parole "is part of the 'prosecution.' " *Ante*, at 658. At the least, *Bradley* precludes the approach taken by the majority. To my mind, it precludes the result reached.

III

Respondent Marrero does not seek release. He seeks only to be treated in the manner Congress now has recognized as appropriate for all criminal offenders, including those convicted of narcotics violations. If a professional Board of Parole determines that parole is in the best interests of an inmate and of society, Congress has determined that the inmate should be paroled. The Court, in my view, makes a serious mistake in expanding § 109 so drastically, and in interpreting § 1103 (a) contrary to its intent and language, in order to preclude this result. With only one exception,[6] the federal courts of appeals that have considered this issue currently reject the Government's argument.[7] Inasmuch as I believe the Gov-

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[6] *Perea* v. *United States Board of Parole*, 480 F. 2d 608 (CA10 1973).

[7] *United States ex rel. Marrero* v. *Warden*, 483 F. 2d 656 (CA3 1973) (the instant case); *Alvarado* v. *McLaughlin*, 486 F. 2d 541 (CA4 1973), pet. for cert. pending *sub nom. McLaughlin* v. *Prieto*; *Amaya* v. *United States Board of Parole*, 486 F. 2d 940 (CA5 1973), pet. for cert. pending; *United States* v. *Marshall*, 158 U. S. App. D. C. 283, 286, 485 F. 2d 1062, 1065 (1973). See *United States* v. *Huguet*, 481 F. 2d 888 (CA2 1973) (question pretermitted). See also *United States* v. *McGarr*, 461 F. 2d 1, 4 (CA7 1972); *United States* v. *Stephens*, 449 F. 2d 103 (CA9 1971). The Second Circuit's earlier decision in *United States* v. *De Simone*, 468 F. 2d 1196

ernment's position here is incorrect, in terms both of the laws and of policy, I would affirm the judgment of the Court of Appeals.

(1972), cert. denied, 410 U. S. 989 (1973), cited by the Court, *ante*, at 656 n. 7, was referred to in *Huguet, supra*, and "cannot be regarded as controlling." 481 F. 2d, at 891.

Syllabus

CENTRAL TABLET MANUFACTURING CO. *v.* UNITED STATES

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

No. 73-593. Argued March 25-26, 1974—Decided June 19, 1974

When a fire destroys insured corporate property *prior* to the corporation's adoption of a complete plan of liquidation, but the fire insurance proceeds are received within 12 months after the plan's adoption, the gain realized from the excess of such proceeds over the corporate taxpayer's adjusted income tax basis in the insured property must be recognized and taxed to the corporation, and is not entitled to nonrecognition under § 337 (a) of the Internal Revenue Code of 1954, which provides, with certain exceptions, for nonrecognition of gain or loss from a corporation's "sale or exchange" of property that takes place during the 12-month period following the corporation's adoption of a plan for complete liquidation effectuated within that period. Pp. 677-691.

(a) The involuntary conversion by fire, recognized as a "sale or exchange" under § 337 (a), takes place when the fire occurs prior to the adoption of the liquidation plan, and not at some post-plan point, such as the subsequent settlement of the insurance claims or their payment, since the fire is the single irrevocable event that fixes the contractual obligation precipitating the transformation of the property, over which the corporation possesses all incidents of ownership, into a chose in action against the insurer. Pp. 683-685.

(b) Section 337 (a) was enacted in order to eliminate technical and formalistic determinations as to the identity of the vendor, as between the liquidating corporation and its shareholders, and, therefore, the reasons for applying § 337 (a) are not present in a situation where the conversion takes place prior to the adoption of the plan when there is no question as to the identity of the owner. Pp. 686-687.

481 F. 2d 954, affirmed.

BLACKMUN, J., delivered the opinion of the Court, in which BURGER, C. J., and STEWART, MARSHALL, and REHNQUIST, JJ., joined. WHITE, J., filed a dissenting opinion, in which DOUGLAS, BRENNAN, and POWELL, JJ., joined, *post*, p. 691.

Larry H. Snyder argued the cause and filed briefs for petitioner.

Stuart A. Smith argued the cause for the United States. With him on the brief were *Solicitor General Bork*, *Assistant Attorney General Crampton*, and *David English Carmack*.

MR. JUSTICE BLACKMUN delivered the opinion of the Court.

Section 337 (a) of the Internal Revenue Code of 1954, 26 U. S. C. § 337 (a),[1] provides, with stated exceptions, for the nonrecognition of gain or loss from a corporation's "sale or exchange" of property that takes place during the 12-month period following the corporation's adoption of a plan of complete liquidation that is effectuated within that period. The issue in this case is whether, when a fire destroys corporate property *prior* to the adoption of a plan of complete liquidation, but the fire insurance proceeds are received after the plan's adoption, the gain realized is or is not to be recognized to the corporation.

I

The facts are not contested. Taxpayer, Central Tablet Manufacturing Company, an Ohio corporation, for

[1] "§ 337. Gain or loss on sales or exchanges in connection with certain liquidations.

"(a) General rule.

"If—

"(1) a corporation adopts a plan of complete liquidation on or after June 22, 1954, and

"(2) within the 12-month period beginning on the date of the adoption of such plan, all of the assets of the corporation are distributed in complete liquidation, less assets retained to meet claims,

"then no gain or loss shall be recognized to such corporation from the sale or exchange by it of property within such 12-month period." 26 U. S. C. § 337 (a).

many years prior to May 14, 1966, was engaged at Columbus, Ohio, in the manufacture and sale of writing tablets, school supplies, art materials, and related items. It filed its federal income tax returns on the accrual basis of accounting and for the fiscal year ended October 31.

On August 13, 1965, a majority of the taxpayer's production and maintenance employees went on strike. As a consequence, production was reduced to about 5% of normal volume. On September 10, during the strike, an accidental fire largely destroyed the taxpayer's plant, its manufacturing equipment and machinery, and its business offices. The damage was never repaired, the strike was never settled, and the taxpayer never again engaged in manufacturing.

At the time of the fire, the taxpayer carried fire and extended coverage insurance on its building, machinery, and inventory. It also carried business interruption insurance. Negotiations relating to the taxpayer's claim for business interruption loss began about October 8, 1965, and those on its claims for building and personal property losses began about November 1. There was dispute as to the estimated period of loss to be covered by the business interruption insurance; as to the probable duration of the strike had the fire not taken place; as to the applicability of the building policy's coinsurance clause; as to the extent of the equipment loss due to the fire rather than to rain; as to the value of the building and equipment at the time of the fire; and as to the cost of repair of repairable machinery and equipment. The threshold liability of the insurance carriers, however, despite their not unusual rejection of the initial formal proofs of claim, was never seriously questioned.

Eight months after the fire, at a special meeting on May 14, 1966, the shareholders of Central Tablet decided to dissolve the corporation and adopted a plan of disso-

lution and complete liquidation pursuant to Ohio Rev. Code Ann. § 1701.86 (1964). App. 38. About six days later, the taxpayer and the insurers settled the building claim; payment of that claim was received in mid-June. In August, the taxpayer settled its personal property claim and received payment on it in November. On May 3, 1967, all assets remaining after liquidating distributions to the shareholders were conveyed to a Columbus bank in trust for the shareholders pending the payment of taxes and the collection of remaining insurance and other claims. On the same date, the taxpayer filed a certificate of dissolution with the Ohio Secretary of State. Ohio Rev. Code Ann. §§ 1701.86 (H) and (I) (1964). All this was accomplished within 12 months of the adoption of the plan on May 14, 1966.

The business interruption claim was settled in August 1967 and payment thereof was received in September of that year.

The fire insurance proceeds exceeded the taxpayer's adjusted income tax basis in the insured property. Gain, therefore, was realized and ordinarily would be recognized and taxed to the corporation. § 1033 (a)(3) of the 1954 Code, 26 U. S. C. § 1033 (a)(3); *Tobias* v. *Commissioner*, 40 T. C. 84, 95 (1963). The taxpayer, however, resorting to § 337 (a), did not report this gain or any part of the business interruption insurance payment in its income tax returns for fiscal 1965 or for any other year. In January 1968, upon audit, the Internal Revenue Service asserted a deficiency in the taxpayer's income tax for fiscal 1965. This was attributable to the Service's inclusion in gross income for that year of (a) capital gain equal to the excess of the fire insurance proceeds over adjusted basis, (b) fiscal 1965's pro rata share of the business interruption insurance payment, and (c) an amount not at issue here. A deficiency in the taxpayer's fiscal

1963 tax was also asserted; this was attributable to a decrease in operating loss carryback from fiscal 1966 because of adjustments in the treatment of the insurance proceeds.[2] The taxpayer paid the deficiencies, filed claims for refund, and, in due time, instituted the present action in federal court to recover the amounts so paid.

The District Court followed the decision in *United States* v. *Morton*, 387 F. 2d 441 (CA8 1968), which concerned a taxpayer on the cash, rather than the accrual, basis, and held that § 337 (a) was available to the taxpayer. 339 F. Supp. 1134 (SD Ohio 1972).[3] Judgment for the taxpayer was entered. On appeal, the United States Court of Appeals for the Sixth Circuit, refusing to follow *Morton*, reversed and remanded. 481 F. 2d 954 (1973). In view of the indicated conflict in the decisions of the Eighth and Sixth Circuits, we granted certiorari. 414 U. S. 1111 (1973).

II

The only issue before us is whether § 337 (a) has application in a situation where, as here, the involuntary conversion occasioned by the fire preceded the adoption of the plan of complete liquidation.[4] This depends upon whether the "sale or exchange," referred to in § 337 (a),

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[2] The deficiencies, including interest, amounted to $70,051.30 for fiscal 1965 and $11,930.30 for fiscal 1963.

[3] *Kinney* v. *United States*, 73–1 U. S. Tax Cas. ¶ 9140 (ND Cal. 1972), decided before the Sixth Circuit's ruling in the present case, and now on appeal to the Ninth Circuit, also followed *Morton*. The corporate taxpayer in *Kinney* was on the accrual basis.

[4] Because the District Court ruled that § 337 (a) had application to Central Tablet's situation, there was no occasion for it to determine in what taxable year the gain to the corporation accrued if it were ultimately decided that § 337 (a) was not applicable. That question remains for resolution upon remand. We intimate no view as to that issue. See generally 2 J. Mertens, Law of Federal Income Taxation § 12.65 and p. 236 (Malone rev. 1967).

took place when the fire occurred or only at some post-plan point, such as the subsequent settlement of the insurance claims, or their payment.

Stated simply, it is the position of the Government that the fire was a single destructive event that effected the conversion (and, therefore, the "sale or exchange") prior to the adoption of the plan of liquidation, thereby rendering § 337 (a) inapplicable. It is the position of the taxpayer, on the other hand, that the fire was not such a single destructive event at all, but was only the initial incident in a series of events—the fire; the preparation and filing of proofs of claim; their preliminary rejection; the negotiations; ultimate dollar agreement by way of settlement; the preparation and submission of final proofs of claim; their formal acceptance; and payment—that stretched over a period of time and came to a meaningful conclusion only *after* the adoption of the plan, and that, consequently, § 337 (a) is applicable.

In order to keep this narrow issue in perspective, it is desirable and necessary to examine the background and the history of § 337.

A corporation is a taxable entity separate and distinct from its shareholders. Ordinarily, a capital gain realized by the corporation is taxable to it. The shareholders, of course, benefit by that realization of gain and the consequent increase in their corporation's assets. The value of their shares, in theory, is thereby enhanced. This increment in value, however, is not taxed at that point to the shareholder. His taxable transaction occurs when he disposes of his shares. The capital gain realized by the corporation, and taxed to it, may be said to be subject to a "second" tax later, that is, when the shareholder disposes of his shares. There is nothing unusual about this. It is a reality of tax law, and it is due to the separateness of the corporation and the shareholder as taxable entities.

This "double tax" possibility took on technical aspects, however, when the capital gain was realized at about the time of, or in connection with, a corporation's liquidation. If liquidation was deemed to have taken place subsequent to the sale or exchange, there was a "second" tax to the shareholder in addition to the tax on the gain to the corporation. On the other hand, because a corporation itself realizes no gain for income tax purposes upon the mere liquidation and distribution of its assets to shareholders, § 311 of the 1954 Code, 26 U. S. C. § 311; see *General Utilities Co.* v. *Helvering,* 296 U. S. 200 (1935), if the liquidation was deemed to have preceded the sale or exchange of the asset, there was no "first" tax to the corporation. Thus, the timing of the gain transaction, in relation to the corporation's liquidation, had important tax consequences. See generally B. Bittker & J. Eustice, Federal Income Taxation of Corporations and Shareholders 11–53 (3d ed. 1971). In short, before § 337 came into the Internal Revenue Code, the overall income tax burden for the liquidating corporate taxpayer and its shareholders was less if the corporation clearly made its distribution of assets prior to the sale or exchange of any of them at a gain.

All this seemed simple and straightforward. The application of the rule, however, as fact situations varied, engendered profound confusion which was enhanced by two decisions by this Court approximately 25 years ago. In *Commissioner* v. *Court Holding Co.,* 324 U. S. 331 (1945), the Court held that a liquidating corporation could not escape taxation on the gain realized from the sale of its sole asset if the corporation itself had arranged the sale prior to liquidation and distribution of the asset to the shareholders. This was so even though the sale was consummated after the distribution. Subsequently, in *United States* v. *Cumberland Public Service Co.,* 338

U. S. 451 (1950), the Court reached exactly the opposite conclusion in a case where the shareholders, rather than the corporation, had negotiated the sale of the distributed assets and, prior to the corporation's liquidation, had been in touch with the purchaser and had offered to acquire the property and sell it to the purchaser. Mr. Justice Black, who wrote for a unanimous court in both cases, recognized that "the distinction between sales by a corporation as compared with distribution in kind followed by shareholder sales may be particularly shadowy and artificial when the corporation is closely held," *id.*, at 454–455, but the Court, nonetheless, determined that the distinction was mandated by the Code:

> "The oddities in tax consequences that emerge from the tax provisions here controlling appear to be inherent in the present tax pattern. For a corporation is taxed if it sells all its physical properties and distributes the cash proceeds as liquidating dividends, yet is not taxed if that property is distributed in kind and is then sold by the shareholders. In both instances the interest of the shareholders in the business has been transferred to the purchaser. . . . Congress having determined that different tax consequences shall flow from different methods by which the shareholders of a closely held corporation may dispose of corporate property, we accept its mandate." *Id.*, at 455–456.

These two cases obviously created a situation where the tax consequences were dependent upon the resolution of often indistinct facts as to whether the negotiations leading to the sale had been conducted by the corporation or by the shareholders. Particularly in the case of a closely held corporation, where there was little, if any, significant difference between management and ownership, this analytical formalism was unsatis-

factory and, indeed, was a trap for the unwary. S. Rep. No. 1622, 83d Cong., 2d Sess., 49 (1954); H. R. Rep. No. 1337, 83d Cong., 2d Sess., A106 (1954). See Cary, The Effect of Taxation on Selling Out a Corporate Business for Cash, 45 Ill. L. Rev. 423 (1950).

It was in direct response to the *Court Holding-Cumberland* confusion and disparate treatment that Congress produced § 337 of the Internal Revenue Code of 1954. The report of the House Committee on Ways and Means on the bill (H. R. 8300) which became the 1954 Code explained the purpose of § 337:

> "Your committee's bill eliminates questions arising as a result of the necessity of determining whether a corporation in process of liquidating made a sale of assets or whether the shareholder receiving the assets made the sale. Compare *Commissioner* v. *Court Holding Company* (324 U. S. 331), with *U. S.* v. *Cumberland Public Service Company* (338 U. S. 451). This last decision indicates that if the distributee actually makes the sale after receipt of the property then there will be no tax on the sale at the corporate level. In order to eliminate questions resulting only from formalities, your committee has provided that if a corporation in process of liquidation sells assets there will be no tax at the corporate level, but any gain realized will be taxed to the distributee-shareholder, as ordinary income or capital gain depending on the character of the asset sold." H. R. Rep. No. 1337, 83d Cong., 2d Sess., 38–39 (1954).

See also *id.*, at A106–A109, where it was said, at A106: "Your committee intends in section [337] to provide a definitive rule which will eliminate any uncertainty." See S. Rep. No. 1622, 83d Cong., 2d Sess., 48–49, 258–260 (1954).

There is nothing in the legislative history indicating that § 337 was enacted in order to eliminate "double taxation" as such. Rather, the statute was designed to eliminate the formalistic distinctions recognized and perhaps encouraged by the decisions in *Court Holding* and *Cumberland*. See Kovey, When Will Section 337 Shield Fire Loss Proceeds? A Current Look at a Burning Issue, 39 J. Taxation 258, 259 n. 2 (1973); Note, Tax-Free Sales in Liquidation Under Section 337, 76 Harv. L. Rev. 780 (1963). See also *West Street-Erie Boulevard Corp.* v. *United States*, 411 F. 2d 738, 740–741 (CA2 1969). The statute was meant to establish a strict but clear rule, with a specified time limitation, upon which planners might rely and which would serve to bring certainty and stability into the corporation liquidation area. The taxpayer here recognizes this statutory purpose. Brief for Petitioner 6–7; Tr. of Oral Arg. 3–4.

Inasmuch as § 337 was drafted to meet and deal with the *Court Holding-Cumberland* situation, where there had been a sale, the statute on its face relates only to "the sale or exchange" of property. It is not surprising, therefore, that further confusion resulted when the Internal Revenue Service found itself confronted by liquidating corporate taxpayers who sought § 337 (a) treatment for casualty gains. Following the Court's decision in *Helvering* v. *William Flaccus Oak Leather Co.*, 313 U. S. 247 (1941),[5] the Internal Revenue Service at first refused to consider § 337 as applicable to a casualty situation at all. Rev. Rul. 56–372, 1956–2 Cum. Bull. 187.

[5] In *Flaccus* the Court held that fire insurance proceeds did not result in gain from a "sale or exchange" of capital assets within the meaning of § 117 (d) of the Revenue Act of 1934, 48 Stat. 715. This result was overcome statutorily by the enactment of § 151 (b) of the Revenue Act of 1942, 56 Stat. 846, now carried over into § 1231 (a) of the 1954 Code, 26 U. S. C. § 1231 (a).

When this was rejected in the courts,[6] the Service reversed its position and treated an involuntary conversion that occurred after adoption of a plan of complete liquidation as a "sale or exchange" with resulting nonrecognition. Rev. Rul. 64–100, 1964–1 Cum. Bull. (Part I) 130.

It is at this point that the issue of the instant case emerges and comes into focus. Although it is now settled that an involuntary conversion by fire is a sale or exchange under § 337 (a), the question that is determinative here remains unresolved: When does the involuntary conversion by a preplan fire take place? Since the statute prescribes a strict 12-month postplan period, it is crucial for the taxpayer that the conversion be deemed to have occurred after the plan of liquidation was adopted.

III

Predictably, the taxpayer analogizes the involuntary conversion to a true sale, and it argues that the conver-

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[6] *Towanda Textiles, Inc.* v. *United States,* 149 Ct. Cl. 123, 180 F. Supp. 373 (1960); *Kent Mfg. Corp.* v. *Commissioner,* 288 F. 2d 812 (CA4 1961). In each of these cases the court relied upon the *Flaccus*-inspired statutory amendment, referred to in the preceding footnote, for its conclusion that an involuntary conversion was covered by § 337 (a). In *Towanda* the Court of Claims permitted § 337 (a) treatment where both the fire and the settlement occurred during the 12-month period *following* the adoption of the plan of liquidation. It observed, "It is not conceivable that Congress would have drawn a distinction between a gain from a voluntary conversion and an involuntary one, had the possibility of an involuntary conversion *during* liquidation come to its attention" (emphasis supplied). 149 Ct. Cl., at 129, 180 F. Supp., at 376. In *Kent,* the Fourth Circuit disallowed § 337 (a) treatment where both the fire and the settlement took place *prior* to the adoption of a plan of liquidation. 288 F. 2d, at 816. (It upheld that taxpayer's argument, however, that the casualty gain there sustained was entitled to nonrecognition specially provided under § 392 (b) of the 1954 Code.) Neither case presented the factual sequence of the case before us.

sion does not occur until settlement is reached and the insurance obligations are finally determined and paid. This essentially is the reasoning employed in the *Morton* case.

There is nothing to indicate that Congress considered this problem when § 337 (a) was adopted. The fact that attention was invariably focused on an actual sale would indicate that the casualty situation was not legislatively anticipated. *Towanda Textiles, Inc.* v. *United States,* 149 Ct. Cl. 123, 129, 180 F. Supp. 373, 376 (1960). Recourse to legislative history, therefore, is somewhat circumstantial in nature. There is, however, one guiding fact, namely, the above-mentioned clear purpose of Congress, in its enactment of § 337 (a), to avoid the *Court Holding-Cumberland* formalities.

The taxpayer's analogy to the ordinary sale transaction has some superficial appeal. It fails, however, to give sufficient consideration to the underlying purpose of § 337 (a). To be sure, under normal circumstances, a true sale is not complete until the mutual obligations (if not the precise terms) are fixed. The Internal Revenue Service has recognized this explicitly in the Regulations by making § 337 (a) available where a sale is negotiated by the corporation prior to the adoption of the plan but is not completed until after the plan is adopted. Treas. Reg. § 1.337–2 (a).[7] This merely acknowledges

[7] The Regulations make the date of the sale dependent "primarily upon the intent of the parties to be gathered from the terms of the contract and the surrounding circumstances." § 1.337–2 (a). They provide that an "executory contract to sell is to be distinguished from a contract of sale." This distinction recognizes the significance of the point in time where the parties can no longer opt out of a transaction. Certainly, a fire insurer has no right to opt out of its coverage and basic liability after the fire takes place; in this respect, the executory contract situation referred to in the Regulations is distinguishable.

that the parties are free to avoid an executory sales contract until it is made final. If the transaction is not completed until after the plan of liquidation is adopted, the corporation is rightfully entitled to § 337 (a) treatment. This result is fully consistent with the aim of Congress to avoid the factual determination that led to the *Court Holding-Cumberland* dichotomy. The fact that the corporation and its shareholders are given this limited opportunity to plan, preliminary and prior to liquidation, for disposal of assets does not mean that the Congress intended to make this opportunity available in every conceivable fact situation.

With a fire loss, the obligation to pay arises upon the fire.[8] Unlike an executory contract to sell, the casualty cannot be rescinded. Details, including even the basic question of liability, may be contested, but the fundamental contractual obligation that precipitates the transformation from tangible property into a chose in action consisting of a claim for insurance proceeds is fixed by the fire. Although the parties remain free to arrive at an acceptable settlement, the obligation itself has come into being, and it is the value of the insured property at that point that governs the claim. In other words, the terms of the obligation cannot be changed unilaterally by the insurer once the fire has occurred.

The fact that the ultimate extent of the gain may not be known or final settlement reached until some

[8] For tax purposes, the formality of filing a proof of claim usually does not change the substance of this conclusion. In any event, the formalities were observed here. The insurer's adjuster was in attendance even while the fire was in progress. App. 42. Notice was immediately given the insurance companies and proofs of loss were promptly submitted. *Id.*, at 13–14. Negotiations began within a month. The adjusters, in making the not uncommon rejection of initial proofs of claim, denied the extent, but hardly the fact, of coverage. *Id.*, at 14–15.

later time does not prevent the occurrence of a "sale or exchange" even in the context of a normal commercial transaction. See, *e. g., Burnet* v. *Logan,* 283 U. S. 404 (1931). The taxpayer's efforts to draw an analogy to a true sale is therefore of limited utility. See Note, Involuntary Conversions and § 337 of the Internal Revenue Code, 31 Wash. & Lee L. Rev. 417, 427–428 (1974).

When the casualty occurs during the 12-month period after the plan of liquidation is adopted, § 337 (a)'s applicability follows as a matter of course. The presence of § 337 (a) creates an expectation in the liquidating corporation that it will not be taxed on gains from sales or exchanges of corporate assets during the 12-month period. The taxpayer corporation then need not be concerned with the formalities of sale and disposal in order to avoid tax on capital gains. Put another way, once the plan is adopted, corporate property is colored with the reasonable expectation that if it is sold or exchanged within 12 months, any resulting gain will not be taxed to the corporation. It follows that if, after the plan is adopted, property is destroyed by casualty, with consequent replacement by insurance proceeds, § 337 (a) treatment is available. The property colored by the expectation has been replaced by insurance proceeds.

When, however, the casualty occurs prior to the adoption of the plan and the corporation's commitment to liquidate, none of these considerations attaches. Moreover, there is nothing in the purpose of § 337 which dictates the extension of its benefits to this preplan situation. Before the adoption of the plan the corporation has no expectation of avoiding tax if it disposes of property at a gain. The corporation, of course, is the beneficiary of the insurance, and both at the time the policy is executed and at the time of the fire, the destroyed property is an asset of the corporation. Prior to the

adoption of the plan, § 337 (a)'s "expectation" simply is not present. For all practical purposes, the disposal of Central Tablet's insured property occurred at the time of its fire. At that time the taxpayer possessed all incidents of ownership. It had evidenced no intention to liquidate. The fire was irremediable. Regardless of the formalities and negotiations that prefaced the actual insurance settlements, the property was parted with at the time of its destruction. When the casualty occurs prior to the corporation's committing itself to liquidation, no *Court Holding-Cumberland* problem is presented.

IV

This interpretation is fully consistent with the manner in which condemnation, the other principal form of involuntary conversion, is treated under § 337. In condemnation, the legally operative event for purposes of the statute is the passage of title under federal or state law, as the case may be, to the condemning authority. This means that in many jurisdictions the "sale or exchange" under § 337 (a) occurs prior to the determination of the amount of condemnation compensation and, indeed, possibly without advance warning to the corporation owner. Rev. Rul. 59–108, 1959–1 Cum. Bull. 72. It has been uniformly recognized that a corporate taxpayer may not avail itself of § 337 (a) where its plan of liquidation is adopted after title has passed by way of condemnation even where no settlement as to condemnation price has been reached or where the corporation had no advance notice of the proposed taking. *Covered Wagon, Inc.* v. *Commissioner,* 369 F. 2d 629, 633–635 (CA8 1966); *Likins-Foster Honolulu Corp.* v. *Commissioner,* 417 F. 2d 285 (CA10 1969), cert. denied, 397 U. S. 987 (1970); *Dwight* v. *United States,* 328 F. 2d 973 (CA2 1964); *Wendell* v. *Commissioner,* 326 F. 2d 600 (CA2

1964). The taxpayer's position here would favor the casualty taxpayer over the condemnation taxpayer.

Although perhaps not an exact parallel, the one date in the casualty loss situation analogous to the passage of title in the condemnation context is the date of the casualty. The fire is the event which fixes the legal obligation to pay the insurance proceeds. As with a nonqualifying preplan condemnation, the fire is the single irrevocable event of significance, and it occurs when title and control over the property are in the corporation. The chose in action against the insurer arises at that time. This is unlike the executory sales contract consummated after the adoption of a plan; there, either of the parties is free unilaterally to avoid whatever preliminary agreement had been reached at the preliquidation negotiations. As with condemnation, the involuntary character of the fire distinguishes it from the normal sale, and, as with condemnation, for purposes of § 337 (a), it is irrelevant that the precise dollar amount of the insurer's obligation remains uncertain. In the casualty situation, the owner of the insured property is deprived of aspects of ownership when the fire occurs in much the same way as the owner of condemned property is deprived at the time title passes. In each case the triggering event is involuntary and irrevocable. Because of the statutorily imposed chronology, the event operates to prevent the corporation's receiving the favorable treatment of § 337 (a). As the *Court Holding* decision exemplifies, "This may appear a harsh result, but if it is to be corrected Congress must act; the courts have no power to do so." *Dwight* v. *United States,* 328 F. 2d, at 974.

V

Again, although not precisely parallel and certainly not controlling, concluding that the "sale or exchange" takes place at the time of the fire is consistent with the ac-

cepted method for determining the holding period of destroyed property in the ascertainment of its long- or short-term capital gain or loss consequences. Where property is destroyed, the holding period terminates at the moment of destruction. *Rose* v. *United States,* 229 F. Supp. 298 (SD Cal. 1964); *Steele* v. *United States,* 52–2 U. S. Tax Cas. ¶ 9451 (SD Fla. 1952); see *Draper* v. *Commissioner,* 32 T. C. 545, 548–549 (1959). Cf. Comment, Extending Section 337 to Liquidations Triggered by the Involuntary Conversion of Corporate Assets, 62 Geo. L. J. 1203, 1213 n. 55 (1974). Were we to accept the taxpayer's argument, we would be left with the anomalous situation of having the "sale" take place after the holding period has terminated for capital gain or loss purposes.

VI

The situation presented by the instant case has been brought to the attention of Congress with the suggestion that the nonrecognition treatment provided by § 337 (a) be extended to preplan involuntary conversions.[9] Con-

[9] In 1959 the Advisory Group made the following recommendation to the House Committee on Ways and Means:

"The advisory group considers it appropriate and desirable to extend the nonrecognition treatment provided by section 337 (a) to all involuntary conversions. Since an involuntary conversion cannot be foreseen and it is impractical to require adoption of the liquidation plan on or before the day of the conversion, it is proposed, as to such conversions, to relax the strict requirements of the section with respect to the time of adoption of the liquidation plan. Since the time of receipt of the proceeds of an involuntary conversion may depend on factors beyond the control of the corporation and receipt within a 12-month period is often impossible, it is proposed also to relax the distribution requirements with respect to such conversions. Accordingly, it is recommended that an involuntary conversion within the meaning of section 1033 be considered a sale or exchange for purposes of section 337, and that the requirements of paragraph (1)(B) regarding the time of distribution, and the requirement of

gress, however, has not acted on this suggestion. It, of course, has provided some tax relief to the victim of a casualty gain by permitting nonrecognition of the gain if the victim-taxpayer uses the proceeds to replace the destroyed property in a specified manner. § 1033 (a)(3) of the 1954 Code, 26 U. S. C. § 1033 (a)(3). But Congress has never disclosed an intention to permit the corporate victim of a casualty with ensuing gain to have the option of liquidating after the casualty occurs and obtaining the benefit of nonrecognition under § 337 (a). If this is desirable policy, it is for the Congress, not the courts, to effectuate. The fact that a tax-oriented and tax-knowledgeable corporation in theory could utilize § 1033 (a)(3) and rebuild with its insurance proceeds without being taxed for the gain, and then adopt a plan of liquidation, surely does not change the result. Tax consequences follow what has taken place, not what might have taken place. *Commissioner* v. *National Alfalfa Dehydrating & Milling Co.*, 417 U. S. 134, 148–149 (1974).

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paragraph (1) that the sale or exchange occur within the 12-month period referred to therein, be considered satisfied if such 12-month period begins not later than 60 days after the disposition of the converted property, as defined in section 1033 (a)(2), and the proceeds of the conversion are distributed within such 12-month period or within 60 days after the receipt thereof by the corporation, whichever is later." Hearings on Advisory Group Recommendations on Subchapters C, J, and K of the Internal Revenue Code before the House Committee on Ways and Means, 86th Cong., 1st Sess., 532 (1959). It is true that this recommendation was made before the Internal Revenue Service had recognized a casualty as a "sale or exchange," within the language of § 337 (a), and that the Service has adopted at least part of the recommendation without congressional action. Nonetheless, the Advisory Group clearly recognized that even if the involuntary conversion were a "sale or exchange," § 337 (a) did not reach the conversion that occurred prior to the adoption of the plan of liquidation, and it proposed "to relax the strict requirements of the section" with respect thereto.

Had Congress enacted § 337 for the avowed purpose of freeing a corporation from tax on gains whenever it decides to liquidate, the result here might well be different. Section 337, however, was not designed to accomplish that broad result. As has been noted, § 337 was designed for the limited purpose of avoiding the technical and formalistic determination of control as between the corporation and the shareholders. By the enactment of § 337 (a), the benefit of any existing doubt in that context was given to the corporate taxpayer. But § 337 (a) is narrowly and specifically drawn. It applies only to a complete liquidation and then only to one fully accomplished in a specified short time. It has no application to a sale or exchange before the adoption of the plan or to one more than 12 months after the adoption. If the statute's precise conditions are not fulfilled, the tax consequences that normally prevail will ensue. Indeed, the statute is not always beneficial, for it operates to make a loss as well as a gain on the sale or exchange nonrecognizable.

The judgment of the Court of Appeals is affirmed.

It is so ordered.

MR. JUSTICE WHITE, with whom MR. JUSTICE DOUGLAS, MR. JUSTICE BRENNAN, and MR. JUSTICE POWELL join, dissenting.

Ordinarily, gain from the sale of corporate property is taxed to the corporation. Under 26 U. S. C. § 337, however, gain from a sale or exchange occurring within 12 months after the adoption of a plan of liquidation is not recognized or taxed to the corporation. Concededly, the section applies to gain from involuntary conversions such as fire losses compensated by insurance, as long as the event qualifying as the sale or exchange takes place after, rather than before, the adoption of a plan of liquida-

tion. As the Court indicates, the sole issue in this case is when the sale or exchange occurred.

Here, the fire took place on September 10, 1965. The plan of liquidation was not adopted until May 14, 1966. But the destroyed property was insured, and the insurance claims were finally negotiated, settled, and paid after May 14, 1966. The Court holds that the sale or exchange took place at the time of the fire; for in its view, it was the fire that transformed "tangible property into a chose in action consisting of a claim for insurance proceeds . . . ." *Ante*, at 685.

I disagree. That the fire gave the company a claim under its insurance policies does not mean that the involuntary conversion qualifying as a sale or exchange took place at that moment. It is my view that such a claim does not ripen into a sale or exchange until it has attained a sufficiently definite quality and value to require the gain or loss to be accrued on the books of an accrual-basis taxpayer. It is plain enough for me that no gain was accruable by Central Tablet until after May 14, 1966, and that the sale or exchange therefore took place after rather than before the adoption of the liquidation plan.

The general rule is that "[t]here shall be allowed as a deduction any loss sustained during the taxable year and not compensated for by insurance or otherwise." 26 U. S. C. § 165 (a). Without doubt, had there not been insurance in this case, Central Tablet would have suffered a deductible loss from the fire and that deduction would have been taken in the year the fire occurred. The ordinary rule also is, however, that deductible losses must be evidenced by closed and completed transactions and fixed by identifiable events. *Boehm* v. *Commissioner*, 326 U. S. 287, 291 (1945). In the context of an insured fire loss, where recovery of insurance is uncertain or unrealistic

the loss is to be taken in the year it occurs. *Coastal Terminals, Inc.* v. *Commissioner*, 25 T. C. 1053 (1956); *Cahn* v. *Commissioner*, 92 F. 2d 674 (CA9 1937). But if there is a fair prospect of recovering insurance proceeds, the loss is to be postponed until the question of recovery is sufficiently settled. *Commissioner* v. *Harwick*, 184 F. 2d 835 (CA5 1950); *Boston & M. R. Co.* v. *Commissioner*, 206 F. 2d 617 (CA1 1953); *Jeffrey* v. *Commissioner*, 12 T. C. M. 534 (1953).[1]

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[1] Treas. Reg. §§ 1.165–1 (d) (1) and (2) provide:

"(d) *Year of deduction.* (1) A loss shall be allowed as a deduction under section 165 (a) only for the taxable year in which the loss is sustained. For this purpose, a loss shall be treated as sustained during the taxable year in which the loss occurs as evidenced by closed and completed transactions and as fixed by identifiable events occurring in such taxable year. For provisions relating to situations where a loss attributable to a disaster will be treated as sustained in the taxable year immediately preceding the taxable year in which the disaster actually occurred, see section 165 (h) and § 1.165–11.

"(2) (i) If a casualty or other event occurs which may result in a loss and, in the year of such casualty or event, there exists a claim for reimbursement with respect to which there is a reasonable prospect of recovery, no portion of the loss with respect to which reimbursement may be received is sustained, for purposes of section 165, until it can be ascertained with reasonable certainty whether or not such reimbursement will be received. Whether a reasonable prospect of recovery exists with respect to a claim for reimbursement of a loss is a question of fact to be determined upon an examination of all facts and circumstances. Whether or not such reimbursement will be received may be ascertained with reasonable certainty, for example, by a settlement of the claim, by an adjudication of the claim, or by an abandonment of the claim. When a taxpayer claims that the taxable year in which a loss is sustained is fixed by his abandonment of the claim for reimbursement, he must be able to produce objective evidence of his having abandoned the claim, such as the execution of a release.

"(ii) If in the year of the casualty or other event a portion of the loss is not covered by a claim for reimbursement with respect to

Similar principles apply to determine when an accrual-basis taxpayer realizes income when an insured fire loss results in taxable gain. Under general principles of accrual accounting, two conditions must be met for income to be accrued in a given taxable year: the taxpayer must have a clear right to the income, and the quantum of the income must be ascertainable within reasonable limits. *United States* v. *Anderson*, 269 U. S. 422, 441 (1926); *Continental Tie & Lumber Co.* v. *United States*, 286 U. S. 290, 297 (1932); *Dixie Pine Co.* v. *Commissioner*, 320 U. S. 516, 519 (1944). "It has long been held that in order truly to reflect the income of a given year, all the events must occur in that year which fix the amount and the fact of the taxpayer's liability. . . ." *Ibid.* These

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which there is a reasonable prospect of recovery, then such portion of the loss is sustained during the taxable year in which the casualty or other event occurs. For example, if property having an adjusted basis of $10,000 is completely destroyed by fire in 1961, and if the taxpayer's only claim for reimbursement consists of an insurance claim for $8,000 which is settled in 1962, the taxpayer sustains a loss of $2,000 in 1961. However, if the taxpayer's automobile is completely destroyed in 1961 as a result of the negligence of another person and there exists a reasonable prospect of recovery on a claim for the full value of the automobile against such person, the taxpayer does not sustain any loss until the taxable year in which the claim is adjudicated or otherwise settled. If the automobile had an adjusted basis of $5,000 and the taxpayer secures a judgment of $4,000 in 1962, $1,000 is deductible for the taxable year 1962. If in 1963 it becomes reasonably certain that only $3,500 can ever be collected on such judgment, $500 is deductible for the taxable year 1963.

"(iii) If the taxpayer deducted a loss in accordance with the provisions of this paragraph and in a subsequent taxable year receives reimbursement for such loss, he does not recompute the tax for the taxable year in which the deduction was taken but includes the amount of such reimbursement in his gross income for the taxable year in which received, subject to the provisions of section 111, relating to recovery of amounts previously deducted."

twin conditions have been formalized by Treas. Reg. § 1.451–1 (a), which provides in relevant part:

> "Under an accrual method of accounting, income is includable in gross income when all the events have occurred which fix the right to receive such income and the amount thereof can be determined with reasonable accuracy. . . ."

These are the governing principles when the issue is whether income from certain insurance policies covering business or personal loss had accrued to the taxpayer. Thus, where an insurance company does not admit liability in the year of the loss, or takes a position in negotiations which makes it quite uncertain whether the bulk of the claim will be recoverable, accrual is improper.[2]

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[2] *Maryland Shipbuilding & Drydock Co.* v. *United States*, 187 Ct. Cl. 523, 409 F. 2d 1363 (1969) (accrual not required because extent of liability contested by insurance company in negotiations not completed in taxable year); *Cappel House Furnishing Co.* v. *United States*, 244 F. 2d 525 (CA6 1957) (liability and approximate amount determined in year of fire because of unreasonable delay of taxpayer in presenting claim, and liability was both clear and could be approximated); *Georgia Carolina Chemical Co.* v. *Commissioner*, 3 T. C. M. 1213 (1944) (extent of liability not fixed in year of loss because of uncertainty as to whether co-insurance clause, which would reduce coverage, would be invoked by insurance company); *Luckenbach S. S. Co.* v. *Commissioner*, 9 T. C. 662 (1947) (amount of recovery on war risk insurance uncertain in years of loss because of controversy between War Shipping Administration and Comptroller General); *Rit-Way Products* v. *Commissioner*, 12 T. C. 475 (1949) (extent and amount of liability of insurance company known in year of loss); *Thalhimer Bros* v. *Commissioner*, 27 T. C. 733 (1957) (where fire occurred six days prior to completion of tax year, insurance proceeds did not accrue because extent of damage still uncertain); *Curtis Electro Lighting* v. *Commissioner*, 60 T. C. 633 (1973) (accrual not required because insurance company had never admitted to liability in any amount in taxable year); *Kurtz* v. *Commissioner*, 8 B. T. A. 679 (1927) (accrual required where insurance company

Although it may generally be true that taxpayers seek to delay reporting income, this may not be so when there are large losses in the year of the conversion to absorb the insurance income. In that situation, the Commissioner may advocate that accrual in the year of the loss is improper. See *E. T. Slider, Inc.* v. *Commissioner*, 5 T. C. 263 (1945) (accrual improper in year of loss because collectibility of insurance proceeds doubtful). The principles of accrual accounting are designed to be neutral, so that the taxpayer may not time his gains and losses in inconsistent fashion to minimize his tax liability.

If normal accrual-accounting principles were to be applied in this case, it is clear that whatever the date on which income accrued to the corporation, it would not be the date of the fire, as the Court of Appeals held. At least some period of time, however short, must be allowed for the taxpayer to determine the extent of loss and to file a timely proof-of-loss form with the insurer. Cf. *Thalhimer Bros.* v. *Commissioner*, 27 T. C. 733 (1957). The question then becomes whether the amount should have accrued prior to or during the 12-month period beginning on May 14, 1966, the date on which the liquidation plan was adopted. This is largely a factual question, depending on whether liability was acknowledged, and whether the amount of liability was reasonably ascertainable before or after the adoption of the plan.

As to the issue of liability, there was some disagreement between the District Court and the Court of Appeals. The District Court found that "[a]t no time was an express admission of liability made by taxpayer's insurance adjusters. Indeed, there is some evidence in the record that the insurance companies denied that notice of claim was properly given." 339 F. Supp. 1134, 1139. The District Court further found that even if liability

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had admitted liability and conceded bulk of loss claimed by taxpayer in year of loss).

had been admitted at some point, there was insufficient evidence in the record to determine at what point that admission occurred, even though that subject had been explored at trial. The Court of Appeals, on the other hand, believed that "the insurance carrier questioned neither the validity of the insurance contracts nor the fulfillment of the conditions for payment thereunder . . . ." 481 F. 2d 954, 956.

However, even accepting the view of the Court of Appeals that liability was not at issue, both courts found that the amount of liability was subject to dispute and negotiation. A number of issues divided the parties throughout the negotiations on the extent of coverage. Negotiations of Central Tablet's claim for business-interruption loss began on approximately October 8, 1965. Disputes subsequently arose over the estimated period of loss to be covered and the probable duration of the strike had there not been a fire, for the purpose of determining the "actual loss sustained." No settlement on this claim was negotiated until August 25, 1967, and, on or about September 22, 1967, petitioner received payment of $67,000, as compared with the maximum of $200,000 available under the two policies, which represented petitioner's initial request in the negotiations.

Negotiation of the building, machinery, and personal property loss claims began on approximately November 1, 1965. On the building insurance policies, dispute focused on a co-insurance clause.[3] The District Court

[3] This is formally termed a replacement-cost-endorsement co-insurance clause. The insurance adjuster explained at trial that a replacement-cost endorsement is bought by the insured to cover, in the event of compensable loss, the replacement cost of lost property. The co-insurance clause requires that the insured carry coverage up to a sufficient limit so that the premiums will justify the coverage. He additionally explained that, if the premiums are determined not to justify the actual replacement cost, coverage is reduced.

found that the questions over the applicability of the clause would reduce petitioner's coverage by 43% if the insurance companies prevailed. The parties also disagreed as to the extent of building loss and the value of the building at the time of the loss. Central Tablet accepted a settlement of its claim on approximately May 20, 1966, and, on June 15, 1966, received $174,595.05 in payment, as compared with the $225,000 stated maximum.

Finally, as to the personal property policy, dispute focused on the value of machinery and equipment and the cost of repair of repairable machinery and equipment. On approximately August 25, 1966, Central Tablet accepted a $104,609.27 settlement on this claim, as compared with the $450,000 stated maximum.

The District Court stated that these negotiations were "exceedingly complex and difficult," and "[i]n each case, substantial discrepancies existed between the initial offers made by the insurance companies, the maximum permissible coverage, and the amounts ultimately negotiated." 339 F. Supp., at 1139. Due to the factual record before it, the District Court concluded that the insurance proceeds did not accrue until after the plan had been adopted. The court stated that "it would be an utter fiction for us to conclude that the taxpayer realized fixed and estimable income before it adopted a plan of liquidation. . . ." *Ibid.* The Court of Appeals also recognized that there was a dispute over the amount to be paid under each policy. The factual findings of the District Court were consistent with the well-settled rule that accrual is only required when the quantum of income is ascertainable within reasonable limits. On the two insurance policies at issue here, the amounts received, $174,000 on the building policy and $104,000 on the personal property policy, compared with stated maximums of $225,000 and $450,000, respectively. These discrepancies bolster

the District Court's conclusion that there were substantial disagreements between the parties.

The general rule is that "[t]axable income shall be computed under the method of accounting on the basis of which the taxpayer regularly computes his income in keeping his books." 26 U. S. C. § 446. Central Tablet was an accrual-basis taxpayer, and it is clear that the amount of the insurance proceeds was not ascertainable with reasonable certainty until after May 14, 1966. No gain was accruable prior to that date, and the District Court was clearly right in holding that there had been no involuntary conversion and no sale or exchange prior to the adoption of the plan of liquidation. Absent the insurance policy, there could have been only a casualty loss, no "involuntary conversion" and no "sale or exchange." And with the various insurance policies owned by the taxpayer, the conversion into cash in an amount reasonably ascertainable did not become sufficiently predictable until after May 14, 1966.

To me, the Government's position in this case is anomalous. Although in arguing that the "sale or exchange" must be deemed to have occurred on the date of the fire, it was suggested by the Government in the Court of Appeals that if the issue were decided in favor of the Government, then a remand would be in order to determine in which year the gain was taxable. The Court of Appeals, whose judgment is now affirmed, followed this suggestion and remanded the case to the District Court. It is thus possible that the District Court, having already once concluded that the gain was not realized until the period of liquidation had begun in 1966, will reach the same conclusion on remand; but the gain under the Court's holding will nonetheless be taxable to the corporation. This seems a very odd result, for if insufficient events occurred in 1965 to warrant the accrual of gain by

an accrual-basis taxpayer, it is incongruous to hold that an involuntary conversion based on the collectibility of insurance proceeds nevertheless occurred at the time of the fire. In the context of the compensated fire loss, the time of realizing gain is the more realistic criterion of when the sale or exchange takes place within the meaning of § 337.

The statute does not tell us when an involuntary conversion qualifying as a sale or exchange must be deemed to have taken place. It provides sufficient flexibility so that in ordinary liquidations, sales or exchanges may be negotiated and all but completed by the corporation before the plan is adopted. It is contemplated that the corporate taxpayer may plan the liquidation and the timing of gains and losses from liquidating sales and exchanges. I perceive no reason why Congress would treat those whom accident forces to convert their property into cash any less favorably than those who have total control of whether a sale is to be made at all. If a compensated fire loss qualifies as a sale or exchange, as the Government concedes it does, it appears perfectly consistent with the terms as well as the purpose of § 337 to hold that the qualifying event occurs when the gain is realized and must be accrued. This would place those who are forced to liquidate on a par with those who chose to liquidate and to realize gains without paying the corporate tax.

The Commissioner argues, however, that there is an analogy between the treatment of condemnation "conversions" and losses by accidents. He would apply to compensated fire losses the uniform rule of the courts of appeals that a corporation is not entitled to the benefits of § 337 when property is condemned prior to the adoption of a liquidation plan. *Wendell* v. *Commissioner*, 326 F. 2d 600 (CA2 1964); *Dwight* v. *United States*, 328 F. 2d 973 (CA2 1964); *Covered Wagon, Inc.* v. *Commissioner*, 369 F. 2d 629 (CA8 1966); *Likins-Foster Honolulu Corp.*

v. *Commissioner*, 417 F. 2d 285 (CA10 1969). The rule in condemnation cases, however, is not directly at odds with accrual-accounting principles. Recognition of income is required at the time of a taking which transfers title to the property and creates an immediate obligation upon the condemning authority to pay just compensation. Rev. Rul. 59–108, 1959–1 Cum. Bull. 72. At the time the Government takes title to the property, it offers to pay a certain amount, thereby fixing its liability in a reasonably ascertainable amount. Under federal law, when the United States condemns property, it files its Declaration of Taking and deposits the amount of estimated compensation for the property in court. *Covered Wagon, Inc., supra*, at 634. The taking vests title in the Government, the condemnee is deprived of his property, and he is certain to recover at least the fair market value estimated by the Government.[4]

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[4] The Commissioner also seeks to analogize this case to those dealing with computing of the holding period of lost or destroyed property in connection with measuring whether the gain from the sale of a capital asset is taxable as short-term or long-term capital gain or ordinary income. See *Rose* v. *United States*, 229 F. Supp. 298, 300 (SD Cal. 1964); *Steele* v. *United States*, 52–2 U. S. Tax Cas. ¶ 9451 (SD Fla. 1952). In *Rose*, which dealt with involuntary conversion in 1960, the holding period of the asset was found to terminate when the ship involved was lost at sea, rather than when insurance proceeds were received. The test for the dating of the end of the holding period is when the benefits or burdens of ownership are transferred or when title passes, whichever occurs first. See Comment, Extending Section 337 to Liquidations Triggered by the Involuntary Conversion of Corporate Assets, 62 Geo. L. J. 1203, 1213 n. 55 (1974). In *Rose*, when the ship was lost the owners totally abandoned it and gave all rights to salvage income to the insurer. Thus, all rights of ownership were relinquished at the time of the loss. The case does not relate to the timing of the receipt of income, as does the instant case, but only to the period of time a capital asset is held. The parties in *Rose* did not dispute that the gain, whether it

This is not the case here. The fire is an irrevocable event and except for the insurance, it would represent a loss immediately accruable. But with insurance coverage, there may be a gain, the amount of which may or may not be reasonably ascertainable, either then or within a short time; and until it is ascertainable, normal rules of accrual accounting would not require any gain to be recognized; and until that occurs the transaction has not sufficiently congealed to qualify as a sale or exchange.

I add a final note. The controlling Treasury Regulations under § 337 provide considerable flexibility to the parties in liquidation situations. Indeed, Treas. Reg. § 1.337–1 provides that "sales may be made *before* the adoption of the plan of liquidation if made on the same day such plan is adopted." (Emphasis added.) Thus, even under the Court's view that the sale or exchange occurs at the time of the fire, § 337 would be available to the property owner if it were sufficiently aware and took sufficient pains to plan in advance to comply with the Regulation or was a closely held corporation that could adopt its liquidation plan before the day of the fire was over. Other taxpayers not so inclined or so circumstanced to provide for contingencies would be foreclosed. Section 337 would remain a trap for the unwary, the precise situation Congress sought to avoid.

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was short-term or long-term, as determined by the holding period, was to be recognized in 1960. This was largely because it appears that all relevant events occurred in that year; the loss, admission of liability, and settlement.

In *Steele*, there was also no dispute as to the timing of recognition. The taxpayer, reporting on a cash basis, received insurance in 1944 for the loss which occurred in 1943. The Commissioner asserted a deficiency for *1944*. Even though the court held that there was not a 6-month holding period, so that the gain was ordinary income, it was still incurred in 1944, the date of the receipt of insurance proceeds, and not in 1943, the date of the loss of the vessel.

Syllabus

BANGOR PUNTA OPERATIONS, INC., ET AL. *v.* BANGOR & AROOSTOOK RAILROAD CO. ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

No. 73–718. Argued April 15, 1974—Decided June 19, 1974

In 1964 petitioner Bangor Punta Corp. (Bangor Punta), through its wholly owned subsidiary, petitioner Bangor Punta Operations, Inc., acquired 98.3% of the outstanding stock of respondent Bangor & Aroostook Railroad Co. (BAR), a Maine railroad, by purchasing all the assets of BAR's holding company, Bangor & Aroostook Corp. (B&A). From 1964 to 1969 Bangor Punta controlled and directed BAR. In 1969 Bangor Punta, again through its subsidiary, sold all its BAR stock to Amoskeag Co., which then assumed responsibility for BAR's management and later acquired additional shares to give it 99% ownership of the outstanding stock. In 1971, BAR and its subsidiary filed an action against Bangor Punta and its subsidiary, alleging various acts of corporate mismanagement of BAR during the period of control from 1960 through 1967 by Bangor Punta and B&A, and seeking damages for violations of the federal antitrust and securities laws, the Maine Public Utilities Act, and the common law of Maine. The District Court first noted that Amoskeag would be the principal beneficiary of any recovery, and was thus the real party in interest, and that since Amoskeag had acquired its BAR stock long after the alleged wrongs had occurred, any recovery by it would be a windfall. The District Court then dismissed the action on the ground that since Amoskeag would have been barred from maintaining a shareholder derivative action due to its failure to satisfy the "contemporaneous ownership" requirement of both Fed. Rule Civ. Proc. 23.1 (1), and state law, equitable principles precluded the use of the corporate fiction to evade that requirement. The Court of Appeals reversed primarily on the ground that in view of BAR's status as a "public" or "quasi-public" corporation and the important nature of the services it provides, any recovery by BAR would also inure to the public's benefit, a factor the court found to be sufficient to support a corporate cause of action and to render any windfall to Amoskeag irrelevant. *Held:*

1. The equitable principles that a stockholder, who has purchased all or substantially all the shares of a corporation from a vendor at a fair price, may not seek to have the corporation recover against that vendor for prior corporate mismanagement, and that the corporate entity may be disregarded if equity so demands, preclude respondent corporations from maintaining the action under either the federal antitrust and securities laws or state law. Pp. 710–713.

(a) Amoskeag, having purchased 98.3% of the stock of BAR from Bangor Punta and alleging no fraud, would have no standing in equity to maintain this action for alleged corporate mismanagement. *Home Fire Insurance Co.* v. *Barber,* 67 Neb. 644, 93 N. W. 1024. Pp. 711–712; 713–714.

(b) As the principal beneficiary of any recovery and itself estopped from complaining of petitioners' alleged wrongs, Amoskeag cannot avoid the command of equity through the guise of proceeding in the name of respondent corporations which it owns and controls. Pp. 711–712; 713–714.

2. The Court of Appeals' assumption that any recovery would necessarily benefit the public is unwarranted and also overlooks the fact that Amoskeag, the actual beneficiary of any recovery, would be unjustly enriched since it has sustained no injury. Neither the federal antitrust and securities laws nor the applicable state laws contemplate a windfall recovery by Amoskeag in these circumstances. Pp. 714–716.

3. Deterrence of railroad mismanagement is not in itself a sufficient ground for allowing respondents to recover. If such deterrence were the only objective, it would suffice if any plaintiff were willing to file a complaint, and no injury or violation of a legal duty to the particular plaintiff would have to be alleged. P. 717.

482 F. 2d 865, reversed.

POWELL, J., delivered the opinion of the Court, in which BURGER, C. J., and STEWART, BLACKMUN, and REHNQUIST, JJ., joined. MARSHALL, J., filed a dissenting opinion, in which DOUGLAS, BRENNAN, and WHITE, JJ., joined, *post,* p. 719.

James V. Ryan argued the cause for petitioners. With him on the briefs was *Roger L. Waldman.*

Alan L. Lefkowitz argued the cause for respondents. With him on the brief was *Edward T. Robinson.**

MR. JUSTICE POWELL delivered the opinion of the Court.

This case involves an action by a Maine railroad corporation seeking damages from its former owners for violations of federal antitrust and securities laws, applicable state statutes, and common-law principles. The complaint alleged that the former owners had engaged in various acts of corporate waste and mismanagement during the period of their control. The shareholder presently in control of the railroad acquired more than 99% of the railroad's shares from the former owners long after the alleged wrongs occurred. We must decide whether equitable principles applicable under federal and state law preclude recovery by the railroad in these circumstances.

I

Respondent Bangor & Aroostook Railroad Co. (BAR), a Maine corporation, operates a railroad in the northern part of the State of Maine. Respondent Bangor Investment Co., also a Maine corporation, is a wholly owned subsidiary of BAR. Petitioner Bangor Punta Corp. (Bangor Punta), a Delaware corporation, is a diversified investment company with business operations in several areas. Petitioner Bangor Punta Operations, Inc. (BPO), a New York corporation, is a wholly owned subsidiary of Bangor Punta.

On October 13, 1964, Bangor Punta, through its subsidiary BPO, acquired 98.3% of the outstanding stock of BAR. This was accomplished by the subsidiary's pur-

**Fritz R. Kahn, Betty Jo Christian,* and *Charles H. White, Jr.,* filed a brief for the Interstate Commerce Commission as *amicus curiae.*

chase of all the assets of Bangor & Aroostook Corp. (B&A), a Maine corporation established in 1960 as the holding company of BAR. From 1964 to 1969, Bangor Punta controlled and directed BAR through its ownership of about 98.3% of the outstanding stock. On October 2, 1969, Bangor Punta, again through its subsidiary, sold all of its stock for $5,000,000 to Amoskeag Co., a Delaware investment corporation. Amoskeag assumed responsibility for the management of BAR and later acquired additional shares to give it ownership of more than 99% of all the outstanding stock.

In 1971, BAR and its subsidiary filed the present action against Bangor Punta and its subsidiary in the United States District Court for the District of Maine. The complaint specified 13 counts of alleged mismanagement, misappropriation, and waste of BAR's corporate assets occurring during the period from 1960 through 1967 when B&A and then Bangor Punta controlled BAR.[1] Damages were sought in the amount of $7,000,000 for violations of both federal and state laws. The federal statutes and regulations alleged to have been violated included § 10 of the Clayton Act, 15 U. S. C. § 20; § 10 (b) of the Securities Exchange Act of 1934, 15 U. S. C. § 78j (b); and Rule 10b–5, 17 CFR § 240.10b–5, as promulgated thereunder by the Securities and Exchange Commission. The state claims were grounded on § 104 of the Maine Public Utilities Act, Maine Rev. Stat.

[1] Several of the alleged acts of corporate mismanagement occurred between 1960 and 1964 when B&A, BAR's holding company, was in control of the railroad. Liability for these acts was nevertheless sought to be imposed on Bangor Punta, even though it had no interest in either BAR or B&A during this period. The apparent basis for liability was the 1964 purchase agreement between B&A and Bangor Punta. The complaint in the instant case alleged that under the agreement Bangor Punta, through its subsidiary, assumed "all . . . debts, obligations, contracts and liabilities" of B&A.

Ann., Tit. 35, § 104 (1965), and the common law of Maine.

The complaint focused on four intercompany transactions which allegedly resulted in injury to BAR.[2] Counts I and II averred that B&A, and later Bangor Punta, overcharged BAR for various legal, accounting, printing, and other services. Counts III, IV, V, and VI averred that B&A improperly acquired the stock of the St. Croix Paper Co. which BAR owned through its subsidiary. Counts VII, VIII, IX, and X charged that B&A and Bangor Punta improperly caused BAR to declare special dividends to its stockholders, including B&A and Bangor Punta, and also caused BAR's subsidiary to borrow in order to pay regular dividends. Counts XI, XII, and XIII charged that B&A improperly caused BAR to excuse payment by B&A and Bangor Punta of the interest due on a loan made by BAR to B&A. In sum, the complaint alleged that during the period of their control of BAR, Bangor Punta, and its predecessor in interest B&A, "exploited it solely for their own purposes" and "calculatedly drained the resources of BAR in violation of law for their own benefit."

The District Court granted petitioners' motion for summary judgment and dismissed the action. 353 F. Supp. 724 (1972). The court first observed that although the suit purported to be a primary action brought in the name of the corporation, the real party in interest and hence the actual beneficiary of any recovery, was Amoskeag, the present owner of more than 99% of the outstanding stock of BAR. The court then noted that Amoskeag had acquired all of its BAR stock long after the alleged wrongs occurred and that Amoskeag

[2] Bangor Punta was alleged to have effected these transactions through its wholly owned subsidiary BPO. For purposes of clarity, we shall attribute BPO's actions directly to Bangor Punta.

did not contend that it had not received full value for its purchase price, or that the purchase transaction was tainted by fraud or deceit. Thus, any recovery on Amoskeag's part would constitute a windfall because it had sustained no injury. With this in mind, the court then addressed the claims based on federal law and determined that Amoskeag would have been barred from maintaining a shareholder derivative action because of its failure to satisfy the "contemporaneous ownership" requirement of Fed. Rule Civ. Proc. 23.1 (1).[3] Finding that equitable principles prevented the use of the corporate fiction to evade the proscription of Rule 23.1, the court concluded that Amoskeag's efforts to recover under the Securities Exchange Act and the Clayton Act must fail. Turning to the claims based on state law, the court recognized that the applicability of Rule 23.1 (1) has been questioned where federal jurisdiction is based on diversity of citizenship.[4] The court found it unnecessary

[3] Rule 23.1 (1), which specifies the requirements applicable to shareholder derivative actions, states that the complaint shall aver that "the plaintiff was a shareholder or member at the time of the transaction of which he complains . . . ." This provision is known as the "contemporaneous ownership" requirement. See 3B J. Moore, Federal Practice ¶ 23.1 *et seq.* (2d ed. 1974).

[4] The "contemporaneous ownership" requirement in shareholder derivative actions was first announced in *Hawes* v. *Oakland*, 104 U. S. 450 (1882), and soon thereafter adopted as Equity Rule 97. This provision was later incorporated in Equity Rule 27 and finally in the present Rule 23.1. After the decision in *Erie R. Co.* v. *Tompkins*, 304 U. S. 64 (1938), the question arose whether the contemporaneous-ownership requirement was one of procedure or substantive law. If the requirement were substantive, then under the regime of *Erie* it could not be validly applied in federal diversity cases where state law permitted a noncontemporaneous shareholder to maintain a derivative action. See 3B J. Moore, Federal Practice ¶¶ 23.1.01–23.1.15 [2] (2d ed. 1974). Although most cases treat the requirement as one of procedure, this Court has never resolved the issue. *Ibid.*

to resolve this issue, however, since its examination of state law indicated that Maine probably followed the "prevailing rule" requiring contemporaneous ownership in order to maintain a shareholder derivative action. Thus, whether the federal rule or state substantive law applied, the present action could not be maintained.

The United States Court of Appeals for the First Circuit reversed. 482 F. 2d 865 (1973). The court stated that its disagreement with the District Court centered primarily on that court's assumption that Amoskeag would be the "sole beneficiary" of any recovery by BAR. The Court of Appeals thought that in view of the railroad's status as a "public" or "quasi-public" corporation and the important nature of the services it provides, any recovery by BAR would also inure to the benefit of the public. The court stated that this factor sufficed to support a corporate cause of action and rendered any windfall to Amoskeag irrelevant. In addition, the court noted that to permit BAR to recover for the alleged wrongs would provide a needed deterrent to "patently undesirable conduct" in the management of railroads. *Id.*, at 871. Finally, the court confronted the possibility that any corporate recovery might be diverted to enrich the present BAR shareholders, mainly Amoskeag, rather than re-invested to improve the railroad's services for the benefit of the public. Although troubled by this prospect, the court concluded that the public interest would nonetheless be better served by insuring that petitioners would not be immune to civil liability for their allegedly wrongful conduct. Without deciding the issue, the court also suggested the possibility of devising "court-imposed limitations" on the use BAR might make of any recovery to insure that the public would actually be benefited.

We granted petitioners' application for certiorari. 414 U. S. 1127 (1974). We now reverse.

II

A

We first turn to the question whether respondent corporations may maintain the present action under § 10 of the Clayton Act, 15 U. S. C. § 20, and § 10 (b) of the Securities Exchange Act of 1934, 15 U. S. C. § 78j (b), and Rule 10b–5, 17 CFR § 240.10b–5. The resolution of this issue depends upon the applicability of the settled principle of equity that a shareholder may not complain of acts of corporate mismanagement if he acquired his shares from those who participated or acquiesced in the allegedly wrongful transactions. See, *e. g., Bloodworth* v. *Bloodworth,* 225 Ga. 379, 387, 169 S. E. 2d 150, 156–157 (1969); *Bookman* v. *R. J. Reynolds Tobacco Co.,* 138 N. J. Eq. 312, 372, 48 A. 2d 646, 680 (Ch. 1946); *Babcock* v. *Farwell,* 245 Ill. 14, 40–41, 91 N. E. 683, 692–693 (1910).[5] This principle has been invoked with special force where a shareholder purchases all or substantially all the shares of a corporation from a vendor at a fair price, and then seeks to have the corporation recover against that vendor for prior corporate mismanagement. See, *e. g., Matthews* v. *Headley Chocolate Co.,* 130 Md. 523, 532–535, 100 A. 645, 650–651 (1917); *Home Fire Insurance Co.* v. *Barber,* 67 Neb. 644, 661–662, 93 N. W. 1024, 1030–1031 (1903). See also *Amen* v. *Black,* 234 F. 2d 12, 23 (CA10 1956). The equitable considerations precluding recovery in such cases were explicated long ago by Dean (then Commissioner) Roscoe Pound in *Home*

[5] This principle obtains in the great majority of jurisdictions. See, *e. g., Russell* v. *Louis Melind Co.,* 331 Ill. App. 182, 72 N. E. 2d 869 (1947); *Klum* v. *Clinton Trust Co.,* 183 Misc. 340, 48 N. Y. S. 2d 267 (1944); *Clark* v. *American Coal Co.,* 86 Iowa 436, 53 N. W. 291 (1892); *Boldenweck* v. *Bullis,* 40 Colo. 253, 90 P. 634 (1907). See 13 W. Fletcher, Cyclopedia Corporations § 5866 (1970 ed.); H. Ballantine, Corporations § 148 (1946 ed.).

Fire Insurance Co. v. *Barber, supra.* Dean Pound, writing for the Supreme Court of Nebraska, observed that the shareholders of the plaintiff corporation in that case had sustained no injury since they had acquired their shares from the alleged wrongdoers after the disputed transactions occurred and had received full value for their purchase price. Thus, any recovery on their part would constitute a windfall, for it would enable them to obtain funds to which they had no just title or claim. Moreover, it would in effect allow the shareholders to recoup a large part of the price they agreed to pay for their shares, notwithstanding the fact that they received all they had bargained for. Finally, it would permit the shareholders to reap a profit from wrongs done to others, thus encouraging further such speculation. Dean Pound stated that these consequences rendered any recovery highly inequitable and mandated dismissal of the suit.

The considerations supporting the *Home Fire* principle are especially pertinent in the present case. As the District Court pointed out, Amoskeag, the present owner of more than 99% of the BAR shares, would be the principal beneficiary of any recovery obtained by BAR. Amoskeag, however, acquired 98.3% of the outstanding shares of BAR from petitioner Bangor Punta in 1969, well after the alleged wrongs were said to have occurred. Amoskeag does not contend that the purchase transaction was tainted by fraud or deceit, or that it received less than full value for its money. Indeed, it does not assert that it has sustained any injury at all. Nor does it appear that the alleged acts of prior mismanagement have had any continuing effect on the corporations involved or the value of their shares.[6] Nevertheless, by causing the pres-

[6] In *Home Fire*, Dean Pound suggested that equitable principles might not prevent recovery where the effects of the wrongful acts continued and resulted in injury to present shareholders. 67 Neb.

ent action to be brought in the name of respondent corporations, Amoskeag seeks to recover indirectly an amount equal to the $5,000,000 it paid for its stock, plus an additional $2,000,000. All this would be in the form of damages for wrongs petitioner Bangor Punta is said to have inflicted, not upon Amoskeag, but upon respondent corporations during the period in which Bangor Punta owned 98.3% of the BAR shares. In other words, Amoskeag seeks to recover for wrongs Bangor Punta did to *itself* as owner of the railroad.[7] At the same time it reaps this windfall, Amoskeag desires to retain all its BAR stock. Under *Home Fire,* it is evident that Amoskeag would have no standing in equity to maintain the present action.[8]

644, 662, 93 N. W. 1024, 1031. In their complaint in the instant case, respondents alleged that "[t]he injury to BAR is a continuing one surviving the aforesaid sale [from petitioner BPO] to Amoskeag." The District Court noted that respondents alleged no facts to support this contention and therefore found any such exception inapplicable. 353 F. Supp. 724, 727 n. 1 (1972). Respondents apparently did not renew this contention on appeal.

[7] Similarly, as to the period before October 1964, Amoskeag seeks to recover for wrongs B&A and its shareholders did to *themselves* as owners of the railroad.

[8] Conceding the lack of equity in any recovery by Amoskeag, the dissent argues that the present action can nevertheless be maintained because there are 20 minority shareholders, holding less than 1% of the BAR stock, who owned their shares "during the period from 1960 through 1967 when the transactions underlying the railroad's complaint took place, and who still owned that stock in 1971 when the complaint was filed." *Post,* at 722. The dissent would conclude that the existence of these innocent minority shareholders entitles BAR, and hence Amoskeag, to recover the entire $7,000,000 amount of alleged damages.

Aside from the illogic of such an approach, the dissent's position is at war with the precedents, for the *Home Fire* principle has long been applied to preclude full recovery by a corporation even where there are innocent minority shareholders who acquired their shares

We are met with the argument, however, that since the present action is brought in the name of respondent corporations, we may not look behind the corporate entity to the true substance of the claims and the actual beneficiaries. The established law is to the contrary. Although a corporation and its shareholders are deemed separate entities for most purposes, the corporate form may be disregarded in the interests of justice where it is used to defeat an overriding public policy. *New Colonial Ice Co.* v. *Helvering*, 292 U. S. 435, 442 (1934); *Chicago, M. & St. P. R. Co.* v. *Minneapolis Civic Assn.*, 247 U. S. 490, 501 (1918). In such cases, courts of equity, piercing all fictions and disguises, will deal with the substance of the action and not blindly adhere to the corporate form. Thus, where equity would preclude the shareholders from maintaining an action in their own right, the corporation would also be precluded. *Amen* v. *Black*, *supra*; *Capitol Wine & Spirit Corp.* v. *Pokrass*, 277 App. Div. 184, 98 N. Y. S. 2d 291 (1950), aff'd, 302 N. Y. 734, 98 N. E. 2d 704 (1951); *Matthews* v. *Headley Chocolate Co.*, *supra*; *Home Fire Insurance Co.* v. *Barber*, *supra*. It follows that Amoskeag, the principal beneficiary of any recovery and itself estopped from complaining of petitioners' alleged wrongs, cannot avoid the command of equity through the guise of proceeding in the name of respondent corporations which it owns and controls.

B

Respondents fare no better in their efforts to maintain the present actions under state law, specifically § 104

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prior to the alleged wrongs. See cases cited at n. 5, *supra*, and accompanying text. The dissent also mistakes the factual posture of this case, since the respondent corporations did not institute this action for the benefit of the minority shareholders. See discussion at n. 15, *infra*.

of the Maine Public Utilities Act, Maine Rev. Stat. Ann., Tit. 35, § 104 (1965), and the common law of Maine. In *Forbes* v. *Wells Beach Casino, Inc.*, 307 A. 2d 210, 223 n. 10 (1973), the Maine Supreme Judicial Court recently declared that it had long accepted the equitable principle that a "stockholder has no standing if either he or his vendor participated or acquiesced in the wrong . . . ." See *Hyams* v. *Old Dominion Co.*, 113 Me. 294, 302, 93 A. 747, 750 (1915).[9] Thus, Amoskeag would be barred from maintaining the present action under Maine law since it acquired its shares from petitioners, the alleged wrongdoers. Moreover, the principle that the corporate entity may be disregarded if equity so demands is accepted by Maine precedents. See, *e. g.*, *Bonnar-Vawter, Inc.* v. *Johnson*, 157 Me. 380, 387–388, 173 A. 2d 141, 145 (1961).

III

In reaching the contrary conclusion, the Court of Appeals stated that it could not accept the proposition that Amoskeag would be the "sole beneficiary" of any recovery by BAR. 482 F. 2d, at 868. The court noted that in view of the railroad's status as a "quasi-public" corporation and the essential nature of the services it provides, the public had an identifiable interest in BAR's

[9] In addition, the new Maine Business Corporation Act adopts the contemporaneous-ownership requirement for shareholder derivative actions. See Maine Rev. Stat. Ann., Tit. 13–A, § 627.1.A (1974). This provision apparently became effective two days after the present action was filed. As the District Court noted, it is an open question whether Maine in fact had a contemporaneous-ownership requirement prior to that time. 353 F. Supp., at 727. See R. Field, V. McKusick & L. Wroth, Maine Civil Practice § 23.2, p. 393 (2d ed. 1970). In the absence of any indication that Maine would not have followed the "prevailing view," the District Court determined that the contemporaneous-ownership requirement of Fed. Rule Civ. Proc. 23.1 applied.

financial health. Thus, any recovery by BAR would accrue to the benefit of the public through the improvement in BAR's economic position and the quality of its services. The court thought that this factor rendered any windfall to Amoskeag irrelevant.

At the outset, we note that the Court of Appeals' assumption that any recovery would necessarily benefit the public is unwarranted. As that court explicitly recognized, any recovery by BAR could be diverted to its shareholders, namely Amoskeag, rather than re-invested in the railroad for the benefit of the public. *Id.*, at 871. Nor do we believe this possibility can be avoided by respondents' suggestion that the District Court impose limitations on the use BAR might make of the recovery.[10] There is no support for such a result under either federal or state law. BAR would be entitled to distribute the recovery in any lawful manner it may choose, even if such distribution resulted only in private enrichment. In sum, there is no assurance that the public would receive any benefit at all from these funds.

The Court of Appeals' position also appears to overlook the fact that Amoskeag, the actual beneficiary of any recovery through its ownership of more than 99% of the BAR shares, would be unjustly enriched since it has sustained no injury.[11] It acquired substantially all the BAR

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[10] The Court of Appeals noted that its decision "is not conditioned on the devising of court-imposed limitations on the uses of any corporate recovery." 482 F. 2d 865, 871. Counsel for respondents also admitted at oral argument that BAR had no legal obligation to use its recovery to improve the railroad's services in order to benefit the public. Tr. of Oral Arg. 17.

[11] The unjust enrichment of Amoskeag is inevitable. As the owner of more than 99% of the BAR shares, Amoskeag would obviously benefit from any increase in the value of its investment. Here, the increased value would be of dramatic proportions, with an influx of $7,000,000 into a railroad purchased for only $5,000,000. The dis-

shares from Bangor Punta subsequent to the alleged wrongs and does not deny that it received full value for its purchase price. No fraud or deceit of any kind is alleged to have been involved in the transaction.[12] The equitable principles of *Home Fire* preclude Amoskeag from reaping a windfall by enhancing the value of its bargain to the extent of the entire purchase price plus an additional $2,000,000. Amoskeag would in effect have acquired a railroad worth $12,000,000 for only $5,000,000. Neither the federal antitrust or securities laws nor the applicable state laws contemplate recovery by Amoskeag in these circumstances.[13]

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sent's suggestion that this substantial infusion of capital, if devoted to "plant and equipment," would not enhance "earning capacity" or "balance sheet strength" (*post*, at 725) will come as a surprise to regulatory bodies, railroad management, and investors.

Respondents have also conceded, both in their brief and at oral argument, that the present action could not be maintained if Amoskeag were the real party in interest, or alternatively, if only an unregulated private corporation were involved. Brief for Respondents 28–29; Tr. of Oral Arg. 19–20.

[12] The dissent's suggestion (*post*, at 723–724) that Amoskeag, a highly sophisticated investor, was defrauded in the purchase transaction and that it has suffered an injury is without support in the record. Not even Amoskeag has ever so asserted, in either the complaint or the briefs, or at oral argument. And in granting the motion for summary judgment, the District Court expressly observed that Amoskeag did not contend that it was defrauded in the purchase transaction. 353 F. Supp., at 726. This statement has since stood uncontroverted by Amoskeag. In short, prior to the dissent today, it has never been alleged or suggested that Amoskeag did not acquire exactly what it bargained for in this transaction.

[13] The dissent makes much of the supposed public interest in railroads and the power of a court of equity to ensure that the public will actually be benefited by any recovery. *Post*, at 724–725, 727–730. This argument misses the point. To begin with, the present action is, in substance, a typical derivative suit seeking an accounting from the previous controlling shareholder for various acts of corporate waste and mismanagement. It is settled law that the fiduciary duty

The Court of Appeals further stated that it was important to insure that petitioners would not be immune from liability for their wrongful conduct and noted that BAR's recovery would provide a needed deterrent to mismanagement of railroads. Our difficulty with this argument is that it proves too much. If deterrence were the only objective, then in logic any plaintiff willing to file a complaint would suffice. No injury or violation of a legal duty to the particular plaintiff would have to be alleged. The only prerequisite would be that the plaintiff agree to accept the recovery, lest the supposed wrongdoer be allowed to escape a reckoning. Suffice it to say that we have been referred to no authority which would support so novel a result, and we decline to adopt it.[14]

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owed by a controlling shareholder extends primarily to those who have a tangible interest in the corporation. Similarly, the recovery provided is intended to compensate, not the public generally, but those who have been injured as a result of a breach of a duty owed to them. In the present case, however, the actual beneficiary of any recovery, Amoskeag, has suffered neither an injury nor a breach of any legal duty. In short, Amoskeag has no cause of action.

The dissent argues that respondents' complaint is based on federal antitrust and securities statutes and that such laws are designed in part to benefit the public. With that much we agree. But the statutory design has not been effectuated through the indiscriminate provision of causes of action to every citizen. Rather, these statutes create specifically defined legal duties to particular plaintiffs and vest the appropriate causes of action in them alone. Here, the statutorily designated plaintiffs are respondent corporations. But, as we have stated, these plaintiffs cannot maintain the present action because a recovery by Amoskeag would violate established principles of equity.

[14] As Dean Pound stated in reply to a similar argument in *Home Fire*:

"But it is said the defendant Barber, by reason of his delinquencies, is in no position to ask that the court look behind the corporation to the real and substantial parties in interest. . . . We do not think such a proposition can be maintained. It is not the function of

We therefore conclude that respondent corporations may not maintain the present action.[15] The judgment of the Court of Appeals is reversed.

So ordered.

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courts of equity to administer punishment. When one person has wronged another in a matter within its jurisdiction, equity will spare no effort to redress the person injured, and will not suffer the wrongdoer to escape restitution to such person through any device or technicality. But this is because of its desire to right wrongs, not because of a desire to punish all wrong-doers. If a wrong-doer deserves to be punished, it does not follow that others are to be enriched at his expense by a court of equity. A plaintiff must recover on the strength of his own case, not on the weakness of the defendant's case. It is his right, not the defendant's wrong-doing, that is the basis of recovery. When it is disclosed that he has no standing in equity, the degree of wrong-doing of the defendant will not avail him." 67 Neb., at 673, 93 N. W., at 1035.

[15] Our decision rests on the conclusion that equitable principles preclude recovery by Amoskeag, the present owner of more than 99% of the BAR shares. The record does not reveal whether the minority shareholders who hold the remaining fraction of 1% of the BAR shares stand in the same position as Amoskeag. Some courts have adopted the concept of a pro-rata recovery where there are innocent minority shareholders. Under this procedure, damages are distributed to the minority shareholders individually on a proportional basis, even though the action is brought in the name of the corporation to enforce primary rights. See, *e. g.*, *Matthews* v. *Headley Chocolate Co.*, 130 Md. 523, 536–540, 100 A. 645, 650–652 (1917). In the present case, respondents have expressly disavowed any intent to obtain a pro-rata recovery on behalf of the 1% minority shareholders of BAR. We therefore do not reach the question whether such recovery would be appropriate.

The dissent asserts that the alleged acts of corporate mismanagement have placed BAR "close to the brink of bankruptcy" and that the present action is maintained for the benefit of BAR's creditors. *Post*, at 726. With all respect, it appears that the dissent has sought to redraft respondents' complaint. As the District Court noted, respondents have not brought this action on behalf of any creditors. 353 F. Supp., at 726. Indeed, they have never so contended. Moreover, respondents have conceded that the financial health of the railroad is excellent. Tr. of Oral Arg. 18.

MR. JUSTICE MARSHALL, with whom MR. JUSTICE DOUGLAS, MR. JUSTICE BRENNAN, and MR. JUSTICE WHITE join, dissenting.

This suit, brought by and in the name of respondent railroad and its wholly owned subsidiary, seeks to recover damages for the conversion and misappropriation of corporate assets allegedly committed by petitioners, Bangor Punta and its wholly owned subsidiary, during a period when the latter was the majority shareholder of the railroad. Ordinarily, of course, a corporation may seek legal redress against those who have defrauded it of its assets. And when it does so: "A corporation and its stockholders are generally to be treated as separate entities. Only under exceptional circumstances . . . can the difference be disregarded." *Burnet* v. *Clark,* 287 U. S. 410, 415 (1932). See also *New Colonial Ice Co.* v. *Helvering,* 292 U. S. 435, 442 (1934).

The Court finds such exceptional circumstances here because, in its view, any recovery had by the corporation will be a windfall to Amoskeag, the present owner of approximately 99% of the corporation's stock, which purchased most of that stock from the petitioners, the alleged wrongdoers. The Court therefore concludes that this suit must be barred under the equitable principles set forth in *Home Fire Insurance Co.* v. *Barber,* 67 Neb. 644, 93 N. W. 1024 (1903).

I cannot agree. Having read the precedents relied upon by the majority, I respectfully submit that they not only do not support, but indeed directly contradict the result reached today. While purporting to rely on settled principles of equity, the Court sadly mistakes the facts of this case and the established powers of an equity court. In my view, no windfall recovery to Amoskeag is inevitable, or even likely, on the facts of this case. But even if recovery by respondents would in fact be a wind-

fall to Amoskeag, the Court disregards the interests of the railroad's creditors, as well as the substantial public interest in the continued financial viability of the Nation's railroads which have been so heavily plagued by corporate mismanagement, and ignores the powers of the court to impose equitable conditions on a corporation's recovery so as to insure that these interests are protected. The Court's decision is also inconsistent with prior decisions of this Court limiting the application of equitable defenses when they impede the vindication, through private damage actions, of the important policies of the federal antitrust laws.

I

The majority places primary reliance on Dean Pound's decision in *Home Fire Insurance Co.* v. *Barber, supra.* In that case, *all* of the shares of the plaintiff corporation had been acquired from the alleged wrongdoers after the transactions giving rise to the causes of action stated in the complaint. Since none of the corporation's shareholders held stock at the time of the alleged wrongful transactions, none had been injured thereby. Dean Pound therefore held that equity barred the corporation from pursuing a claim where none of its shareholders could complain of injury.

Dean Pound thought it clear, however, that the opposite result would obtain if *any* of the present shareholders

> "are entitled to complain of the acts of the defendant and of his past management of the company; for if any of them are so entitled, there can be no doubt of the right and duty of the corporation to maintain this suit. It would be maintainable in such a case even though the wrong-doers continued to be stockholders and would share in the proceeds." 67 Neb., at 655, 93 N. W., at 1028.

Cf. *Capitol Wine & Spirit Corp.* v. *Pokrass,* 277 App. Div.

184, 186, 98 N. Y. S. 2d 291, 293 (1950), aff'd, 302 N. Y. 734, 98 N. E. 2d 704 (1951).

The rationale for the distinction drawn by Dean Pound is simple enough. The sole shareholder who defrauds or mismanages his own corporation hurts only himself. For the corporation to sue him for his wrongs is simply to take money out of his right pocket and put it in his left. It is therefore appropriate for equity to intervene to pierce the corporate veil. But where there are minority shareholders, misappropriation and conversion of corporate assets injure their interests as well as the interest of the majority shareholder. The law imposes upon the directors of a corporation a fiduciary obligation to all of the corporation's shareholders, and part of that obligation is to use due care to ensure that the corporation seek redress where a majority shareholder has drained the corporation's resources for his own benefit and to the detriment of minority shareholders.[1] Indeed, minority shareholders would be entitled to bring a derivative action, on behalf of the corporation, to enforce the corporation's right to recover for the injury done to it, if the directors turned down a request to seek relief.[2] And any recovery

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[1] See generally 3 W. Fletcher, Cyclopedia Corporations § 1012 (1965). Indeed, the failure to exercise reasonable care to seek redress for wrongs done the corporation might well subject the directors to personal liability. See, *e. g.*, *Briggs* v. *Spaulding*, 141 U. S. 132 (1891); *Kavanaugh* v. *Commonwealth Trust Co. of New York*, 223 N. Y. 103, 119 N. E. 237 (1918).

[2] "[Stockholders' derivative suits] are one of the remedies which equity designed for those situations where the management through fraud, neglect of duty or other cause declines to take the proper and necessary steps to assert the rights which the corporation has." *Meyer* v. *Fleming*, 327 U. S. 161, 167 (1946). And it is irrelevant that the shareholders bringing the derivative action own only a small percentage of the total outstanding shares. See *Ashwander* v. *TVA*, 297 U. S. 288, 318 (1936); *Subin* v. *Goldsmith*, 224 F. 2d 753, 761 (CA2), cert. denied, 350 U. S. 883 (1955).

obtained in such an action would belong to the corporation, not to the minority shareholders as individuals, for the shareholder in a derivative action enforces not his own individual rights, but rights which the corporation has. See *Meyer* v. *Fleming*, 327 U. S. 161, 167 (1946); *Ross* v. *Bernhard*, 396 U. S. 531, 538 (1970); *Koster* v. *Lumbermens Mutual Co.*, 330 U. S. 518, 522 (1947).

These elementary principles of corporate law should control this case. Although first Bangor Punta and then Amoskeag owned the great majority of the shares of respondent railroad, the record shows that there are many minority shareholders who owned BAR stock during the period from 1960 through 1967 when the transactions underlying the railroad's complaint took place, and who still owned that stock in 1971 when the complaint was filed.[3] Any one of these minority shareholders would have had the right, during the 1960–1967 period, as well as thereafter, to bring a derivative action on behalf of the corporation against the majority shareholder for misappropriation of corporate assets. As Dean Pound states, such an action could be brought, "even though the wrongdoers continued to be stockholders and would share in the proceeds." 67 Neb., at 655, 93 N. W., at 1028.

It is ironic, then, to see the Court adopt a result which bars the corporation itself from bringing a suit which a minority shareholder could have brought in the corporation's behalf. And it is peculiar, to say the least, that the law should prevent the directors of BAR from fulfilling the fiduciary obligation to minority shareholders which the law devolves upon them. Such a result not only cannot be derived from *Home Fire*, but is directly in conflict with its holding.

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[3] According to the complaint, there were 20 individual minority shareholders, many of whom acquired their shares in the 1950's. App. 6–7, 22–23.

II

Even assuming, however, that the equitable principles of *Home Fire* should be extended to the situation where the present majority shareholder does not own all the outstanding shares, there are other features distinguishing this case from *Home Fire* and calling for the recognition of the railroad's right to maintain this action. To begin with, it is not at all clear from the record that any recovery had by the railroad will in fact be a windfall to Amoskeag, its present majority shareholder.

The Court relies principally on its own observation that Amoskeag was not defrauded or deceived in its transaction with petitioners, that it received full value for its money, and that it has received no injury whatsoever. See *ante*, at 711. The record, in my view, simply will not support these "findings." That there is no specific allegation in the complaint that Amoskeag was deceived or otherwise injured by petitioners is understandable, since this lawsuit is not brought by Amoskeag, but rather by respondent railroad in its own name.

Furthermore, a fair reading of the complaint indicates that Amoskeag most likely has suffered injury. The causes of action relate primarily to transactions involving the railroad and its former majority stockholder between 1960 and 1967. Amoskeag purchased its shares from petitioners on October 2, 1969, after these events. But nowhere in the record is there any concession that, at the time of its purchase, Amoskeag was fully aware of the misuses of corporate assets alleged in the complaint. To the contrary, the complaint asserts that at the time of Amoskeag's purchase, the Interstate Commerce Commission's Bureau of Accounts was in the middle of an investigation into the relationship between the railroad and its majority shareholder. Its report, not made public until July 1971, laid bare for the first time the wrongful

intercorporate transactions that are the subject of the present suit and recommended that legal remedies be explored to require petitioners to pay back to the carrier assets taken without compensation and charges made where no services were performed. The plain import of the complaint is that Amoskeag did not know of these wrongful transactions prior to public disclosure of this report. In fact, an introductory paragraph of the complaint alleges: "All wrongs hereinafter complained of were discovered by BAR's new management's investigation of all facets of the inter-corporate relationships and were not previously known to the new BAR management." App. 6. At this stage in the litigation, such allegations must be accepted as true, the District Court having dismissed the suit without inquiring into the truth of any of its claims. There is accordingly no basis in the record for presuming that Amoskeag was not the victim of any deception.

But even assuming that Amoskeag received close to full value for its money, it is by no means inevitable that any recovery obtained by the railroad will inure to Amoskeag's benefit, rather than to the benefit of the corporation, its creditors, and the public it aims to serve. The Court makes much of the supposed lack of power of a court of equity to impose limitations on the use BAR might make of the recovery. *Ante,* at 715. "Traditionally," however, "equity has been characterized by a practical flexibility in shaping its remedies and by a facility for adjusting and reconciling public and private needs." *Brown* v. *Board of Education,* 349 U. S. 294, 300 (1955). "A court of equity may in its discretion in the exercise of the jurisdiction committed to it grant or deny relief upon performance of a condition which will safeguard the public interest." *SEC* v. *United States Realty & Improvement Co.,* 310 U. S. 434, 455

(1940).[4] Indeed, if there be any doubt as to the power of a court of equity, BAR informed the District Court that the railroad would voluntarily enter into a stipulation to ensure that any recovery would be reinvested in the railroad, for upgrading the right-of-way and for new equipment, and that Amoskeag would voluntarily join the stipulation if requested. Brief for Respondents 30.

Improved equipment and rights-of-way, of course, might benefit Amoskeag indirectly by increasing to some extent the value of its equity. But such expenditures would hardly bring a dollar-for-dollar increase in the price Amoskeag would receive if it were to sell its stock. The value of a solvent railroad's stock is determined by many factors—earning capacity; historical income, excluding nonrecurring items; balance sheet strength; dividend history; and condition of plant and equipment. Under an appropriate decree, only the last of these factors would be enhanced by the railroad's recovery. It is therefore not inevitable that any recovery had by the railroad would benefit its current majority shareholder and there is no basis, in any event, for deeming such a benefit a windfall.

III

But let us assume that the majority is correct in finding some windfall recovery to Amoskeag inevitable in this case. This is still but one of several factors which a court of equity should consider in determining whether

[4] It is interesting to note that the majority's restrictive notions as to the power of a court of equity to direct the application of a recovery are in conflict with the majority's own suggestion for protecting the interests of innocent minority shareholders. See *ante*, at 718 n. 15. If a court of equity lacks power to direct a corporation to apply the proceeds of a recovery in any particular fashion, how can the court direct the corporation to distribute a pro-rata recovery to some, but not all, of its shareholders?

the public interest would best be served by piercing the corporate veil in order to bar this action. The public interest against windfall recoveries is no doubt a significant factor which a court of equity should consider. But in this case it is clearly outweighed by other considerations, equally deserving the recognition of a court of equity, supporting the maintenance of the railroad's action against those who have defrauded it of its assets.

Equity should take into account, for example, the railroad's relationships with its creditors. BAR owes a debt of approximately $23 million, indicating almost 90% debt ownership of the enterprise. App. 7. If the allegations of the complaint are true, the conversion and misappropriation of corporate assets committed by petitioners placed the railroad close to the brink of bankruptcy, to the certain detriment of its creditors. The complaint alleges that net revenue in 1970 was a loss of approximately $1.3 million. *Id.*, at 5. And one of the specific causes of action in the complaint is that Bangor Punta procured the declaration by BAR of a dividend which was unlawful under a mortgage bond indenture due to insufficient working capital. *Id.*, at 15–18.

Surely the corporation, as an entity independent of its shareholders, has an interest of its own in assuring that it can meet its responsibility to its creditors. And I do not see how it can do so unless it remains free to bring suit against those who have defrauded it of its assets. The Court's result, I fear, only gives added incentive to abuses of the corporate form which equity has long sought to discourage—allowing a majority shareholder to take advantage of the protections of the corporate form while bleeding the corporation to the detriment of its creditors, and then permitting the majority shareholder to sell the corporation and remain free from any liability for its wrongdoing.

More importantly, equity should take into account the public interest at stake in this litigation. As the Court of Appeals indicated:

> "The public's interest, unlike the private interest of stockholder or creditor, is not easily defined or quantified, yet it is real and cannot, we think, be overlooked in determining whether the corporation, suing in its own right, should be estopped by equitable defenses pertaining only to its controlling stockholder." 482 F. 2d 865, 868 (CA1 1973).

The public's interest in the financial health of railroads has long been recognized by this Court:

> "[R]ailways are public corporations organized for public purposes, granted valuable franchises and privileges, among which the right to take the private property of the citizen *in invitum* is not the least, . . . many of them are the donees of large tracts of public lands and of gifts of money by municipal corporations, and . . . they all primarily owe duties to the public of a higher nature even than that of earning large dividends for their shareholders. The business which the railroads do is of a public nature, closely affecting almost all classes in the community . . . ." *United States* v. *Trans-Missouri Freight Assn.*, 166 U. S. 290, 332–333 (1897).

The same public interest has been recognized in a wide variety of legislative enactments. As early as the Transportation Act of 1920, "Congress undertook to develop and maintain, for the people of the United States, an adequate railway system. It recognized that preservation of the earning capacity, and conservation of the financial resources, of individual carriers is a matter of national concern . . . ." *Texas & Pacific R. Co.* v. *Gulf, C. & S. F. R. Co.*, 270 U. S. 266, 277 (1926). Later,

Congress added § 77 to Chapter VIII of the Bankruptcy Act, providing that financial reorganization of ailing railroads should be achieved for the benefit of the public, and not simply in the interests of creditors or stockholders. See *New Haven Inclusion Cases*, 399 U. S. 392, 492 (1970).

The significance of the public interest in the financial well-being of railroads should be self-evident in these times, with many of our Nation's railroads in dire financial straits and with some of the most important lines thrown into reorganization proceedings. Indeed, the prospect of large-scale railroad insolvency in the Northeast United States was deemed by Congress to present a national emergency, prompting enactment of the Regional Rail Reorganization Act of 1973, Pub. L. 93–236, 87 Stat. 985 (1974), in which the Federal Government, for the first time, committed tax dollars to a long-term commitment to preserve adequate railroad service for the Nation. As the Court of Appeals held, given this background, "it would be unrealistic to treat a railroad's attempt to secure the reparation of misappropriated assets as of concern only to its controlling stockholder." 482 F. 2d, at 870. "[T]he public has a real, if inchoate, interest" in this action. *Id.*, at 871.

The Court gives short shrift, however, to the public interest. While recognizing that respondents' complaint is based primarily on federal antitrust and securities statutes designed to benefit the public, and while conceding that the statutorily designated plaintiffs are respondent corporations, the Court nevertheless holds that these plaintiffs cannot maintain this action because any recovery by Amoskeag would violate established principles of equity. *Ante*, at 716–717, n. 13. I cannot agree, for the public interest and the legislative purpose should always be heavily weighed by a court of equity. As this Court

has frequently recognized, equity should pierce the corporate veil only when necessary to serve some paramount public interest, see *Schenley Corp.* v. *United States,* 326 U. S. 432, 437 (1946); *Anderson* v. *Abbott,* 321 U. S. 349, 362 (1944), or "where it otherwise would present an obstacle to the due protection or enforcement of public or private rights." *New Colonial Ice Co.* v. *Helvering,* 292 U. S., at 442. Here, however, it is the failure to recognize the railroad's own right to maintain this suit which undercuts the public interest.

The Court's result substantially impairs enforcement of the state and federal statutes upon which the railroad bases many of its claims. For example, § 10 of the Clayton Act, 15 U. S. C. § 20, relied on in two substantial counts of the complaint, provides:

> "No common carrier engaged in commerce shall have any dealings in securities, supplies, or other articles of commerce . . . to the amount of more than $50,000, in the aggregate, in any one year, with another corporation . . . when the said common carrier shall have upon its board of directors or as its president . . . any person who is at the same time a director [or] manager . . . of . . . such other corporation . . . unless . . . such dealings shall be with, the bidder whose bid is the most favorable to such common carrier, to be ascertained by competitive bidding . . . ."

As we have earlier had occasion to note, § 10 is not an ordinary corporate conflict-of-interest statute, but is part of our Nation's antitrust laws, specifically designed to protect common carriers such as railroads. See *United States* v. *Boston & Maine R. Co.,* 380 U. S. 157 (1965); *Minneapolis & St. Louis R. Co.* v. *United States,* 361 U. S. 173, 190 (1959). The purpose of § 10 "was to prohibit a

corporation from abusing a carrier . . . through overreaching by, or other misfeasance of, common directors, to the financial injury of the carrier and the consequent impairment of its ability to serve the public interest." 361 U. S., at 190.

The private causes of action brought by respondent railroad under § 10 serve to vindicate this important congressional policy. See *Klinger* v. *Baltimore & Ohio R. Co.*, 432 F. 2d 506 (CA2 1970). And by barring this suit, notwithstanding the plain allegations in the complaint that the carrier as well as the public interest it serves were injured through violations of this section committed by petitioners,[5] the Court directly frustrates the ends of Congress. Indeed, the Court encourages the very kind of abuses § 10 was designed to prohibit. The majority shareholder of a carrier can convert and misappropriate its assets through improper intercorporate transactions, with the "consequent impairment of its ability to serve the public interest," and then wash its hands of and remain free from any legal liability for its statutory violation by selling off its interest.[6]

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[5] The complaint alleges that the special and illegal dividends which petitioners caused BAR to declare "served to deprive plaintiff BAR of a source of cash which could and would have been utilized for necessary maintenance and equipment acquisitions and replacements, all to the injury of BAR and the public which it serves." App. 16.

[6] These arguments are applicable as well to the causes of action stated under § 104 of the Maine Public Utilities Act, Maine Rev. Stat. Ann., Tit. 35, § 104 (1965), which provides in pertinent part:

"No public utility doing business in this State shall . . . make any contract or arrangement, providing for the furnishing of . . . services . . . with any corporation . . . owning in excess of 25% of the voting capital stock of such public utility . . . unless and until such contract or arrangement shall have been found by the commission

I would find counsel instead in this Court's opinion in *Perma Life Mufflers* v. *International Parts Corp.*, 392 U. S. 134, 138–139 (1968). The Court took note in that case that "[w]e have often indicated the inappropriateness of invoking broad common-law barriers to relief where a private suit serves important public purposes." As we recognized,

> "the purposes of the antitrust laws are best served by insuring that the private action will be an ever-present threat to deter anyone contemplating business behavior in violation of the antitrust laws. The plaintiff who reaps the reward of treble damages may be no less morally reprehensible than the defendant, but the law encourages his suit to further the overriding public policy in favor of competition. A more fastidious regard for the relative moral worth of the parties would only result in seriously undermining the usefulness of the private action as a bulwark of antitrust enforcement."

These principles have even greater force here, since Amoskeag, "whatever its own lack of equity, is neither a

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not to be adverse to the public interest and shall have received their [*sic*] written approval."

While different from § 10 of the Clayton Act in certain details (applying to all public utilities rather than only to carriers, and relying on the supervision of an administrative agency rather than the device of competitive bidding), the Maine statute clearly has the same underlying purpose: to protect the public interest from abuses of public utilities through intercorporate transactions with a major shareholder. While Maine law governs the causes of action under this section and the courts of Maine have, in other cases, accepted the general equitable principle that a stockholder has no standing to sue if he or his vendor participated in the wrong, see *ante*, at 714, there is no basis in Maine law for applying this equitable doctrine where the direct result is to leave remediless the very abuses § 104 was designed to prohibit.

wrongdoer nor a participant in any wrong." 482 F. 2d, at 870–871.

In the final analysis, the Court's holding does a disservice to one of the most settled of equitable doctrines, reflected in the maxim that "[e]quity will not suffer a wrong without a remedy." *Independent Wireless Tel. Co.* v. *Radio Corp. of America,* 269 U. S. 459, 472 (1926). Because I would follow that maxim here and permit respondent railroad to maintain this action to seek redress for the wrongs allegedly done to it and to the public interest it serves, I respectfully dissent.

Syllabus

PARKER, WARDEN, ET AL. *v.* LEVY

APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 73–206. Argued February 20, 1974—Decided June 19, 1974

Article 90 (2) of the Uniform Code of Military Justice (Code) provides for punishment of any person subject to the Code who "willfully disobeys a lawful command of his superior commissioned officer"; Art. 133 punishes a commissioned officer for "conduct unbecoming an officer and a gentleman"; and Art. 134 (the general article) punishes any person subject to the Code for, *inter alia*, "all disorders and neglects to the prejudice of good order and discipline in the armed forces," though not specifically mentioned in the Code. Appellee, an Army physician assigned to a hospital, was convicted by a general court-martial of violating Art. 90 (2) for disobeying the hospital commandant's order to establish a training program for Special Forces aide men, and of violating Arts. 133 and 134 for making public statements urging Negro enlisted men to refuse to obey orders to go to Vietnam and referring to Special Forces personnel as "liars and thieves," "killers of peasants," and "murderers of women and children." After his conviction was sustained within the military and he exhausted this avenue of relief, appellee sought habeas corpus relief in the District Court, challenging his conviction on the ground that both Art. 133 and Art. 134 are "void for vagueness" under the Due Process Clause of the Fifth Amendment and overbroad in violation of the First Amendment. The District Court denied relief, but the Court of Appeals reversed, holding that Arts. 133 and 134 are void for vagueness, that while appellee's conduct fell within an example of Art. 134 violations contained in the Manual for Courts-Martial, the possibility that the articles would be applied to others' future conduct as to which there was insufficient warning, or which was within the area of protected First Amendment expression, was enough to give appellee standing to challenge both articles on their face, and that the joint consideration of the Art. 90 charges gave rise to a "reasonable possibility" that appellee's right to a fair trial was prejudiced, so that a new trial was required. *Held:*

1. Articles 133 and 134 are not unconstitutionally vague under the Due Process Clause of the Fifth Amendment. Pp. 752–757.

(a) Each article has been construed by the United States Court of Military Appeals or by other military authorities, such as the Manual for Courts-Martial, so as to limit its scope, thus narrowing the very broad reach of the literal language of the articles, and at the same time supplying considerable specificity by way of examples of the conduct that they cover. Pp. 752–755.

(b) The articles are not subject to being condemned for specifying no standard of conduct at all, but are of the type of statutes which "by their terms or as authoritatively construed apply without question to certain activities, but whose application to other behavior is uncertain," *Smith* v. *Goguen*, 415 U. S. 566, 578. Pp. 755–756.

(c) Because of the factors differentiating military from civilian society, Congress is permitted to legislate with greater breadth and flexibility when prescribing rules for the former than when prescribing rules for the latter, and the proper standard of review for a vagueness challenge to Code articles is the standard that applies to criminal statutes regulating economic affairs, and that standard was met here, since appellee could have had no reasonable doubt that his statements urging Negro enlisted men not to go to Vietnam if ordered to do so was both "unbecoming an officer and gentleman" and "to the prejudice of good order and discipline in the armed forces," in violation of Arts. 133 and 134, respectively. Pp. 756–757.

2. Nor are Arts. 133 and 134 facially invalid because of overbreadth. Pp. 757–761.

(a) Doctrines of First Amendment overbreadth asserted in support of challenges to imprecise language like that contained in Arts. 133 and 134 are not exempt from the operation of the principles that while military personnel are not excluded from First Amendment protection, the fundamental necessity for obedience, and the consequent necessity for discipline, may render permissible within the military that which would be constitutionally impermissible outside it. Pp. 758–759.

(b) There is a wide range of conduct to which Arts. 133 and 134 may be applied without infringing the First Amendment, and while there may be marginal applications in which First Amendment values would be infringed, this is insufficient to invalidate either article at appellee's behest. His conduct in publicly urging enlisted personnel to refuse to obey orders which might send them into combat was unprotected under the most expansive notions of the First Amendment, and Arts. 133 and 134

may constitutionally prohibit that conduct, and a sufficiently large number of similar or related types of conduct so as to preclude their invalidation for overbreadth. Pp. 760–761.

3. Appellee's contention that even if Arts. 133 and 134 are constitutional, his conviction under Art. 90 should be invalidated because to carry out the hospital commandant's order would have constituted participation in a war crime and because the commandant gave the order, knowing it would be disobeyed, for the sole purpose of increasing appellee's punishment, is not of constitutional significance and is beyond the scope of review, since such defenses were resolved against appellee on a factual basis by the court-martial that convicted him. P. 761.

478 F. 2d 772, reversed.

REHNQUIST, J., delivered the opinion of the Court, in which BURGER, C. J., and WHITE, BLACKMUN, and POWELL, JJ., joined. BLACKMUN, J., filed a concurring statement, in which BURGER, C. J., joined, *post*, p. 762. DOUGLAS, J., filed a dissenting opinion, *post*, p. 766. STEWART, J., filed a dissenting opinion, in which DOUGLAS and BRENNAN, JJ., joined, *post*, p. 773. MARSHALL, J., took no part in the consideration or decision of the case.

Solicitor General Bork argued the cause for appellants. With him on the brief were *Assistant Attorney General Petersen, Allan A. Tuttle,* and *Jerome M. Feit.*

Charles Morgan, Jr., argued the cause for appellee. With him on the brief were *Norman Siegel, Laughlin McDonald, Morris Brown, Neil Bradley, Reber F. Boult, Jr., Anthony G. Amsterdam, Alan H. Levine, Burt Neuborne, Melvin L. Wulf,* and *Henry W. Sawyer III.**

MR. JUSTICE REHNQUIST delivered the opinion of the Court.

Appellee Howard Levy, a physician, was a captain in the Army stationed at Fort Jackson, South Carolina.

*Briefs of *amici curiae* urging affirmance were filed by *Marvin M. Karpatkin* and *Thomas M. Comerford* for the Association of the Bar of the City of New York, and by *Joseph H. Sharlitt* and *Neal E. Krucoff* for Richard G. Augenblick.

He had entered the Army under the so-called "Berry Plan," [1] under which he agreed to serve for two years in the Armed Forces if permitted first to complete his medical training. From the time he entered on active duty in July 1965 until his trial by court-martial, he was assigned as Chief of the Dermatological Service of the United States Army Hospital at Fort Jackson. On June 2, 1967, appellee was convicted by a general court-martial of violations of Arts. 90, 133, and 134 of the Uniform Code of Military Justice, and sentenced to dismissal from the service, forfeiture of all pay and allowances, and confinement for three years at hard labor.

The facts upon which his conviction rests are virtually undisputed. The evidence admitted at his court-martial trial showed that one of the functions of the hospital to which appellee was assigned was that of training Special Forces aide men. As Chief of the Dermatological Service, appellee was to conduct a clinic for those aide men. In the late summer of 1966, it came to the attention of the hospital commander that the dermatology training of the students was unsatisfactory. After investigating the program and determining that appellee had totally neglected his duties, the commander called appellee to his office and personally handed him a written order to conduct the training. Appellee read the order, said that he understood it, but declared that he would not obey it because of his medical ethics. Appellee persisted in his refusal to obey the order, and later reviews of the program established that the training was still not being carried out.

During the same period of time, appellee made several public statements to enlisted personnel at the post, of which the following is representative:

"The United States is wrong in being involved in

[1] See 50 U. S. C. App. § 454 (j).

> the Viet Nam War. I would refuse to go to Viet Nam if ordered to do so. I don't see why any colored soldier would go to Viet Nam: they should refuse to go to Viet Nam and if sent should refuse to fight because they are discriminated against and denied their freedom in the United States, and they are sacrificed and discriminated against in Viet Nam by being given all the hazardous duty and they are suffering the majority of casualties. If I were a colored soldier I would refuse to go to Viet Nam and if I were a colored soldier and were sent I would refuse to fight. Special Forces personnel are liars and thieves and killers of peasants and murderers of women and children."

Appellee's military superiors originally contemplated nonjudicial proceedings against him under Art. 15 of the Uniform Code of Military Justice, 10 U. S. C. § 815, but later determined that court-martial proceedings were appropriate. The specification under Art. 90 alleged that appellee willfully disobeyed the hospital commandant's order to establish the training program, in violation of that article, which punishes anyone subject to the Uniform Code of Military Justice who "willfully disobeys a lawful command of his superior commissioned officer." [2] Statements to enlisted personnel were

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[2] Article 90 of the Uniform Code of Military Justice, 10 U. S. C. § 890, provides:

"Any person subject to this chapter who—

"(1) strikes his superior commissioned officer or draws or lifts up any weapon or offers any violence against him while he is in the execution of his office; or

"(2) willfully disobeys a lawful command of his superior commissioned officer;

"shall be punished, if the offense is committed in time of war, by death or such other punishment as a court-martial may direct, and

listed as specifications under the charges of violating Arts. 133 and 134 of the Code. Article 133 provides for the punishment of "conduct unbecoming an officer and a gentleman," [3] while Art. 134 proscribes, *inter alia*, "all disorders and neglects to the prejudice of good order and discipline in the armed forces." [4]

The specification under Art. 134 alleged that appellee "did, at Fort Jackson, South Carolina, . . . with design to promote disloyalty and disaffection among the troops, publicly utter [certain] statements to divers enlisted personnel at divers times . . . ." [5] The specification under

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if the offense is committed at any other time, by such punishment, other than death, as a court-martial may direct."

[3] Article 133 of the Uniform Code of Military Justice, 10 U. S. C. § 933, provides:

"Any commissioned officer, cadet, or midshipman who is convicted of conduct unbecoming an officer and a gentleman shall be punished as a court-martial may direct."

[4] Article 134 of the Uniform Code of Military Justice, 10 U. S. C. § 934, provides:

"Though not specifically mentioned in this chapter, all disorders and neglects to the prejudice of good order and discipline in the armed forces, all conduct of a nature to bring discredit upon the armed forces, and crimes and offenses not capital, of which persons subject to this chapter may be guilty, shall be taken cognizance of by a general, special, or summary court-martial, according to the nature and degree of the offense, and shall be punished at the discretion of that court."

[5] The specification under Art. 134 (Charge II) alleged in full:

"In that Captain Howard B. Levy, U. S. Army, Headquarters and Headquarters Company, United States Army Hospital, Fort Jackson, South Carolina, did, at Fort Jackson, South Carolina, on or about the period February 1966 to December 1966, with design to promote disloyalty and disaffection among the troops, publicly utter the following statements to divers enlisted personnel at divers times: 'The United States is wrong in being involved in the Viet Nam War. I would refuse to go to Viet Nam if ordered to do so. I don't see why any colored soldier would go to Viet Nam; they should refuse to go to Viet Nam and if sent should refuse to fight because they are

Art. 133 alleged that appellee did "while in the performance of his duties at the United States Army Hospital . . . wrongfully and dishonorably" make statements variously described as intemperate, defamatory, provoking, disloyal, contemptuous, and disrespectful to Special Forces personnel and to enlisted personnel who were patients or under his supervision.[6]

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discriminated against and denied their freedom in the United States, and they are sacrificed and discriminated against in Viet Nam by being given all the hazardous duty and they are suffering the majority of casualties. If I were a colored soldier I would refuse to go to Viet Nam and if I were a colored soldier and were sent I would refuse to fight. Special Forces personnel are liars and thieves and killers of peasants and murderers of women and children,' or words to that effect, which statements were disloyal to the United States, to the prejudice of good order and discipline in the armed forces."

[6] The specification under Art. 133 (Additional Charge I) alleged that appellee

"did . . . at divers times during the period from on or about February 1966 to on or about December 1966 while in the performance of his duties at the United States Army Hospital, Fort Jackson, South Carolina, wrongfully and dishonorably make the following statements of the nature and to and in the presence and hearing of the persons as hereinafter more particularly described, to wit: (1) Intemperate, defamatory, provoking, and disloyal statements to special forces enlisted personnel present for training in the United States Army Hospital, Fort Jackson, South Carolina, and in the presence and hearing of other enlisted personnel, both patients and those performing duty under his immediate supervision and control and dependent patients as follows: 'I will not train special forces personnel because they are "liars and thieves," "killers of peasants," and "murderers of women and children," ' or words to that effect; (2) Intemperate and disloyal statements to enlisted personnel, both patients and those performing duty under his immediate supervision and control as follows: 'I would refuse to go to Vietnam if ordered to do so. I do not see why any colored soldier would go to Vietnam. They should refuse to go to Vietnam; and, if sent, they should refuse to fight because they are discriminated against and denied their freedom in the United States and they are sacrificed and

Appellee was convicted by the court-martial, and his conviction was sustained on his appeals within the military.[7] After he had exhausted this avenue of relief, he sought federal habeas corpus in the United States District Court for the Middle District of Pennsylvania, challenging his court-martial conviction on a number of grounds. The District Court, on the basis of the voluminous record of the military proceedings and the argument of counsel, denied relief. It held that the "various articles of the Uniform Code of Military Justice are not unconstitutional for vagueness," citing several decisions

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discriminated against in Vietnam by being given all the hazardous duty, and they are suffering the majority of casualties. If I were a colored soldier, I would refuse to go to Vietnam; and, if I were a colored soldier and if I were sent to Vietnam, I would refuse to fight', or words to that effect; (3) Intemperate, contemptuous, and disrespectful statements to enlisted personnel performing duty under his immediate supervision and control, as follows: 'The Hospital Commander has given me an order to train special forces personnel, which order I have refused and will not obey,' or words to that effect; (4) Intemperate, defamatory, provoking, and disloyal statements to special forces personnel in the presence and hearing of enlisted personnel performing duty under his immediate supervision and control, as follows: 'I hope when you get to Vietnam something happens to you and you are injured,' or words to that effect; all of which statements were made to persons who knew that the said Howard B. Levy was a commissioned officer in the active service of the United States Army."

[7] *United States* v. *Levy*, CM 416463, 39 C. M. R. 672 (1968), petition for review denied, No. 21,641, 18 U. S. C. M. A. 627 (1969). Appellee also unsuccessfully sought relief in the civilian courts. *Levy* v. *Corcoran*, 128 U. S. App. D. C. 388, 389 F. 2d 929, application for stay denied, 387 U. S. 915, cert. denied, 389 U. S. 960 (1967); *Levy* v. *Resor*, 17 U. S. C. M. A. 135, 37 C. M. R. 399 (1967); *Levy* v. *Resor*, Civ. No. 67–442 (SC July 5, 1967), aff'd *per curiam*, 384 F. 2d 689 (CA4 1967), cert. denied, 389 U. S. 1049 (1968); *Levy* v. *Dillon*, 286 F. Supp. 593 (Kan. 1968), aff'd, 415 F. 2d 1263 (CA10 1969).

of the United States Court of Military Appeals.[8] The court rejected the balance of appellee's claims without addressing them individually, noting that the military tribunals had given fair consideration to them and that the role of the federal courts in reviewing court-martial proceedings was a limited one.

The Court of Appeals reversed, holding in a lengthy opinion that Arts. 133 and 134 are void for vagueness. 478 F. 2d 772 (CA3 1973). The court found little difficulty in concluding that "as measured by contemporary standards of vagueness applicable to statutes and ordinances governing civilians," the general articles "do not pass constitutional muster." It relied on such cases as *Grayned* v. *City of Rockford,* 408 U. S. 104 (1972); *Papachristou* v. *City of Jacksonville,* 405 U. S. 156 (1972); *Giaccio* v. *Pennsylvania,* 382 U. S. 399 (1966); *Coates* v. *City of Cincinnati,* 402 U. S. 611 (1971), and *Gelling* v. *Texas,* 343 U. S. 960 (1952). The Court of Appeals did not rule that appellee was punished for doing things he could not reasonably have known constituted conduct proscribed by Art. 133 or 134. Indeed, it recognized that his conduct fell within one of the examples of Art. 134 violations contained in the Manual for Courts-Martial, promulgated by the President by Executive Order.[9] Nonetheless, relying chiefly on *Gooding* v. *Wilson,* 405 U. S. 518 (1972), the Court found the possibility that Arts. 133 and 134 would be applied to future conduct of others as to which there was insufficient warning, or which was within the area of protected First Amendment expression, was enough to give

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[8] *United States* v. *Howe,* 17 U. S. C. M. A. 165, 37 C. M. R. 429 (1967); *United States* v. *Sadinsky,* 14 U. S. C. M. A. 563, 34 C. M. R. 343 (1964); *United States* v. *Frantz,* 2 U. S. C. M. A. 161, 7 C. M. R. 37 (1953).

[9] Manual for Courts-Martial ¶ 213f (5) (1969).

appellee standing to challenge both articles on their face. While it acknowledged that different standards might in some circumstances be applicable in considering vagueness challenges to provisions which govern the conduct of members of the Armed Forces, the Court saw in the case of Arts. 133 and 134 no "countervailing military considerations which justify the twisting of established standards of due process in order to hold inviolate these articles, so clearly repugnant under current constitutional values." Turning finally to appellee's conviction under Art. 90, the Court held that the joint consideration of Art. 90 charges with the charges under Arts. 133 and 134 gave rise to a "reasonable possibility" that appellee's right to a fair trial was prejudiced, so that a new trial was required.

Appellants appealed to this Court pursuant to 28 U. S. C. § 1252. We set the case for oral argument, and postponed consideration of the question of our jurisdiction to the hearing on the merits. 414 U. S. 973 (1973).[10]

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[10] Title 28 U. S. C. § 1252 provides in pertinent part that "[a]ny party may appeal to the Supreme Court from an interlocutory or final judgment, decree or order of any court of the United States, . . . holding an Act of Congress unconstitutional in any civil action, suit, or proceeding to which the United States or any of its agencies, or any officer or employee thereof, as such officer or employee, is a party. . . ." In his motion to dismiss or affirm, appellee urged a lack of jurisdiction in this Court because the attorneys who filed and served the notice of appeal were not attorneys of record and because the attorney effecting service failed to comply with Rule 33.3 (c) of this Court requiring persons not admitted to the Bar of this Court to prove service by affidavit, rather than by certificate. Appellee alternatively contended that 28 U. S. C. § 1252 was not intended to permit appeals from the courts of appeals, but only from the district courts. We postponed consideration of the jurisdictional question to the hearing on the merits. Appellee now renews his contentions that the asserted defects in appellants' filing of their

I

This Court has long recognized that the military is, by necessity, a specialized society separate from civilian society. We have also recognized that the military has, again by necessity, developed laws and traditions of its own during its long history. The differences between the military and civilian communities result from the fact that "it is the primary business of armies and navies to fight or be ready to fight wars should the occasion arise." *United States ex rel. Toth* v. *Quarles*, 350 U. S. 11, 17 (1955). In *In re Grimley*, 137 U. S. 147, 153 (1890), the Court ob-

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notice of appeal should be treated as a failure to file a timely notice of appeal, and that the appeal must accordingly be dismissed. See, *e. g.*, *Territo* v. *United States*, 358 U. S. 279 (1959); *Department of Banking* v. *Pink*, 317 U. S. 264, 268 (1942). He also urges that the question whether an appeal may be taken to this Court from the Court of Appeals under 28 U. S. C. § 1252 presents a question of first impression.

We hold that "any court of the United States," as used in § 1252, includes the courts of appeals. The Reviser's Note for § 1252 states that the "term 'any court of the United States' includes the courts of appeals . . . ." The definitional section of Title 28, 28 U. S. C. § 451, provides: "As used in this title: The term 'court of the United States' includes the Supreme Court of the United States, courts of appeals, district courts . . . ." Our reading of § 1252 is further supported by that section's legislative history. Section 1252 was originally enacted as § 2 of the Act of August 24, 1937, c. 754, 50 Stat. 751. Section 5 of that same Act defined "any court of the United States" to include any "circuit court of appeals." We also find no merit in appellee's contention that the asserted defects in appellants' notice of appeal deprive this Court of jurisdiction. As appellants note, appellee makes no claim that he did not have actual notice of the filing of the notice of appeal. Assuming that there was technical noncompliance with Rule 33 of this Court for the reasons urged by appellee, that noncompliance does not deprive this Court of jurisdiction. Cf. *Taglianetti* v. *United States*, 394 U. S. 316 n. 1 (1969); *Heflin* v. *United States*, 358 U. S. 415, 418 n. 7 (1959).

served: "An army is not a deliberative body. It is the executive arm. Its law is that of obedience. No question can be left open as to the right to command in the officer, or the duty of obedience in the soldier." More recently we noted that "[t]he military constitutes a specialized community governed by a separate discipline from that of the civilian," *Orloff* v. *Willoughby*, 345 U. S. 83, 94 (1953), and that "the rights of men in the armed forces must perforce be conditioned to meet certain overriding demands of discipline and duty . . . ." *Burns* v. *Wilson*, 346 U. S. 137, 140 (1953) (plurality opinion). We have also recognized that a military officer holds a particular position of responsibility and command in the Armed Forces:

> "The President's commission . . . recites that 'reposing special trust and confidence in the patriotism, valor, fidelity and abilities' of the appointee he is named to the specified rank during the pleasure of the President." *Orloff* v. *Willoughby*, *supra*, at 91.

Just as military society has been a society apart from civilian society, so "[m]ilitary law . . . is a jurisprudence which exists separate and apart from the law which governs in our federal judicial establishment." *Burns* v. *Wilson*, *supra*, at 140. And to maintain the discipline essential to perform its mission effectively, the military has developed what "may not unfitly be called the customary military law" or "general usage of the military service." *Martin* v. *Mott*, 12 Wheat. 19, 35 (1827). As the opinion in *Martin* v. *Mott* demonstrates, the Court has approved the enforcement of those military customs and usages by courts-martial from the early days of this Nation:

> ". . . Courts Martial, when duly organized, are bound to execute their duties, and regulate their modes of proceeding, in the absence of positive enactments.

> Upon any other principle, Courts Martial would be left without any adequate means to exercise the authority confided to them: for there could scarcely be framed a positive code to provide for the infinite variety of incidents applicable to them." *Id.*, at 35–36.

An examination of the British antecedents of our military law shows that the military law of Britain had long contained the forebears of Arts. 133 and 134 in remarkably similar language. The Articles of the Earl of Essex (1642) provided that "[a]ll other faults, disorders and offenses, not mentioned in these Articles, shall be punished according to the general customs and laws of war." One of the British Articles of War of 1765 made punishable "all Disorders or Neglects . . . to the Prejudice of good Order and Military Discipline . . ." that were not mentioned in the other articles.[11] Another of those articles provided:

> "Whatsoever Commissioned Officer shall be convicted before a General Court-martial, of behaving in a scandalous infamous Manner, such as is unbecoming the Character of an Officer and a Gentleman, shall be discharged from Our Service." [12]

In 1775 the Continental Congress adopted this last article, along with 68 others for the governance of its army.[13] The following year it was resolved by the Congress that "the committee on spies be directed to revise the rules and articles of war; this being a committee of five, consisting of John Adams, Thomas Jefferson, John

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[11] Section XX, Art. III, of the British Articles of War of 1765; W. Winthrop, Military Law and Precedents 946 (2d ed. 1920).

[12] Section XV, Art. XXIII, of the British Articles of War of 1765; Winthrop, *supra*, at 945.

[13] Article XLVII of the American Articles of War of 1775; Winthrop, *supra*, at 957.

Rutledge, James Wilson and R. R. Livingston . . . ." [14] The article was included in the new set of articles prepared by the Committee, which Congress adopted on September 20, 1776.[15] After being once more re-enacted without change in text in 1786, it was revised and expanded in 1806, omitting the terms "scandalous" and "infamous," so as to read:

> "Any commissioned officer convicted before a general court-martial of conduct unbecoming an officer and a gentleman, shall be dismissed [from] the service." [16]

From 1806, it remained basically unchanged through numerous congressional re-enactments until it was enacted as Art. 133 of the Uniform Code of Military Justice in 1951.

The British article punishing "all Disorders and Neglects . . ." was also adopted by the Continental Congress in 1775 and re-enacted in 1776.[17] Except for a revision in 1916, which added the clause punishing "all conduct of a nature to bring discredit upon the military service," [18] substantially the same language was preserved throughout the various re-enactments of this article too, until in 1951 it was enacted as Art. 134 of the Uniform Code of Military Justice.

Decisions of this Court during the last century have recognized that the longstanding customs and usages

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[14] *Id.*, at 22.

[15] Article 21 of Section XIV of the American Articles of War of 1776; Winthrop, *supra*, at 969.

[16] Article 83 of Section 1 of the American Articles of War of 1806; Winthrop, *supra*, at 983.

[17] Article L of the American Articles of War of 1775; Art. 5 of section XVIII of the American Articles of War of 1776; Winthrop, *supra*, at 957, 971.

[18] Act of Aug. 29, 1916, c. 418, 39 Stat. 619, 666.

of the services impart accepted meaning to the seemingly imprecise standards of Arts. 133 and 134. In *Dynes* v. *Hoover,* 20 How. 65 (1857), this Court upheld the Navy's general article, which provided that "[a]ll crimes committed by persons belonging to the navy, which are not specified in the foregoing articles, shall be punished according to the laws and customs in such cases at sea." The Court reasoned:

> "[W]hen offences and crimes are not given in terms or by definition, the want of it may be supplied by a comprehensive enactment, such as the 32d article of the rules for the government of the navy, which means that courts martial have jurisdiction of such crimes as are not specified, but which have been recognised to be crimes and offences by the usages in the navy of all nations, and that they shall be punished according to the laws and customs of the sea. Notwithstanding the apparent indeterminateness of such a provision, it is not liable to abuse; for what those crimes are, and how they are to be punished, is well known by practical men in the navy and army, and by those who have studied the law of courts martial, and the offences of which the different courts martial have cognizance." *Id.,* at 82.

In *Smith* v. *Whitney,* 116 U. S. 167 (1886), this Court refused to issue a writ of prohibition against Smith's court-martial trial on charges of "[s]candalous conduct tending to the destruction of good morals" and "[c]ulpable inefficiency in the performance of duty." The Court again recognized the role of "the usages and customs of war" and "old practice in the army" in the interpretation of military law by military tribunals. *Id.,* at 178–179.

In *United States* v. *Fletcher,* 148 U. S. 84 (1893), the Court considered a court-martial conviction under what is

now Art. 133, rejecting Captain Fletcher's claim that the court-martial could not properly have held that his refusal to pay a just debt was "conduct unbecoming an officer and a gentleman." The Court of Claims decision which the Court affirmed in *Fletcher* stressed the military's "higher code termed honor, which holds its society to stricter accountability" [19] and with which those trained only in civilian law are unfamiliar. In *Swaim* v. *United States,* 165 U. S. 553 (1897), the Court affirmed another Court of Claims decision, this time refusing to disturb a court-martial conviction for conduct "to the prejudice of good order and military discipline" in violation of the Articles of War. The Court recognized the role of "unwritten law or usage" in giving meaning to the language of what is now Art. 134. In rejecting Swaim's argument that the evidence failed to establish an offense under the article, the Court said:

> "[T]his is the very matter that falls within the province of courts-martial, and in respect to which their conclusions cannot be controlled or reviewed by the civil courts. As was said in *Smith* v. *Whitney,* 116 U. S. 178, 'of questions not depending upon the construction of the statutes, but upon unwritten military law or usage, within the jurisdiction of courts-martial, military or naval officers, from their training and experience in the service, are more competent judges than the courts of common law.' " 165 U. S., at 562.

The Court of Claims had observed that cases involving "conduct to the prejudice of good order and military discipline," as opposed to conduct unbecoming an officer, "are still further beyond the bounds of ordinary judicial judgment, for they are not measurable by our innate

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[19] *Fletcher* v. *United States,* 26 Ct. Cl. 541, 563 (1891).

sense of right and wrong, of honor and dishonor, but must be gauged by an actual knowledge and experience of military life, its usages and duties." [20]

II

The differences noted by this settled line of authority, first between the military community and the civilian community, and second between military law and civilian law, continue in the present day under the Uniform Code of Military Justice. That Code cannot be equated to a civilian criminal code. It, and the various versions of the Articles of War which have preceded it, regulate aspects of the conduct of members of the military which in the civilian sphere are left unregulated. While a civilian criminal code carves out a relatively small segment of potential conduct and declares it criminal, the Uniform Code of Military Justice essays more varied regulation of a much larger segment of the activities of the more tightly knit military community. In civilian life there is no legal sanction—civil or criminal—for failure to behave as an officer and a gentleman; in the military world, Art. 133 imposes such a sanction on a commissioned officer. The Code likewise imposes other sanctions for conduct that in civilian life is not subject to criminal penalties: disrespect toward superior commissioned officers, Art. 89, 10 U. S. C. § 889; cruelty toward, or oppression or maltreatment of subordinates, Art. 93, 10 U. S. C. § 893; negligent damaging, destruction, or wrongful disposition of military property of the United States, Art. 108, 10 U. S. C. § 908; improper hazarding of a vessel, Art. 110, 10 U. S. C. § 910; drunkenness on duty, Art. 112, 10 U. S. C. § 912; and malingering, Art. 115, 10 U. S. C. § 915.

But the other side of the coin is that the penalties provided in the Code vary from death and substantial

[20] *Swaim* v. *United States*, 28 Ct. Cl. 173, 228 (1893).

penal confinement at one extreme to forms of administrative discipline which are below the threshold of what would normally be considered a criminal sanction at the other. Though all of the offenses described in the Code are punishable "as a court-martial may direct," and the accused may demand a trial by court-martial,[21] Art. 15 of the Code also provides for the imposition of nonjudicial "disciplinary punishments" for minor offenses without the intervention of a court-martial. 10 U. S. C. § 815. The punishments imposable under that article are of a limited nature. With respect to officers, punishment may encompass suspension of duty, arrest in quarters for not more than 30 days, restriction for not more than 60 days, and forfeiture of pay for a limited period of time. In the case of enlisted men, such punishment may additionally include, among other things, reduction to the next inferior pay grade, extra fatigue duty, and correctional custody for not more than seven consecutive days. Thus, while legal proceedings actually brought before a court-martial are prosecuted in the name of the Government, and the accused has the right to demand that he be proceeded against in this manner before any sanctions may be imposed upon him, a range of minor sanctions for lesser infractions are often imposed administratively. Forfeiture of pay, reduction in rank, and even dismissal from the service bring to mind the law of labor-management relations as much as the civilian criminal law.

In short, the Uniform Code of Military Justice regulates a far broader range of the conduct of military personnel than a typical state criminal code regulates of the conduct of civilians; but at the same time the enforcement of that Code in the area of minor offenses

[21] Art. 15 (a), 10 U. S. C. § 815 (a).

is often by sanctions which are more akin to administrative or civil sanctions than to civilian criminal ones.

The availability of these lesser sanctions is not surprising in view of the different relationship of the Government to members of the military. It is not only that of lawgiver to citizen, but also that of employer to employee. Indeed, unlike the civilian situation, the Government is often employer, landlord, provisioner, and lawgiver rolled into one. That relationship also reflects the different purposes of the two communities. As we observed in *In re Grimley*, 137 U. S., at 153, the military "is the executive arm" whose "law is that of obedience." While members of the military community enjoy many of the same rights and bear many of the same burdens as do members of the civilian community, within the military community there is simply not the same autonomy as there is in the larger civilian community. The military establishment is subject to the control of the civilian Commander in Chief and the civilian departmental heads under him, and its function is to carry out the policies made by those civilian superiors.

Perhaps because of the broader sweep of the Uniform Code, the military makes an effort to advise its personnel of the contents of the Uniform Code, rather than depending on the ancient doctrine that everyone is presumed to know the law. Article 137 of the Uniform Code, 10 U. S. C. § 937, requires that the provisions of the Code be "carefully explained to each enlisted member at the time of his entrance on active duty, or within six days thereafter" and that they be "explained again after he has completed six months of active duty . . . ." Thus the numerically largest component of the services, the enlisted personnel, who might be expected to be a good deal less familiar with the Uniform Code than commissioned officers, are required by its terms

to receive instructions in its provisions. Article 137 further provides that a complete text of the Code and of the regulations prescribed by the President "shall be made available to any person on active duty, upon his request, for his personal examination."

With these very significant differences between military law and civilian law and between the military community and the civilian community in mind, we turn to appellee's challenges to the constitutionality of Arts. 133 and 134.

III

Appellee urges that both Art. 133 and Art. 134 (the general article) are "void for vagueness" under the Due Process Clause of the Fifth Amendment and overbroad in violation of the First Amendment. We have recently said of the vagueness doctrine:

> "The doctrine incorporates notions of fair notice or warning. Moreover, it requires legislatures to set reasonably clear guidelines for law enforcement officials and triers of fact in order to prevent 'arbitrary and discriminatory enforcement.' Where a statute's literal scope, unaided by a narrowing state court interpretation, is capable of reaching expression sheltered by the First Amendment, the doctrine demands a greater degree of specificity than in other contexts." *Smith* v. *Goguen*, 415 U. S. 566, 572–573 (1974).

Each of these articles has been construed by the United States Court of Military Appeals or by other military authorities in such a manner as to at least partially narrow its otherwise broad scope.

The United States Court of Military Appeals has stated that Art. 134 must be judged "not in vacuo, but in the context in which the years have placed it," *United States* v. *Frantz*, 2 U. S. C. M. A. 161, 163, 7

C. M. R. 37, 39 (1953). Article 134 does not make "every irregular, mischievous, or improper act a court-martial offense," *United States* v. *Sadinsky,* 14 U. S. C. M. A. 563, 565, 34 C. M. R. 343, 345 (1964), but its reach is limited to conduct that is " 'directly and palpably—as distinguished from indirectly and remotely—prejudicial to good order and discipline.' " *Ibid.; United States* v. *Holiday,* 4 U. S. C. M. A. 454, 456, 16 C. M. R. 28, 30 (1954). It applies only to calls for active opposition to the military policy of the United States, *United States* v. *Priest,* 21 U. S. C. M. A. 564, 45 C. M. R. 338 (1972), and does not reach all "[d]isagreement with, or objection to, a policy of the Government." *United States* v. *Harvey,* 19 U. S. C. M. A. 539, 544, 42 C. M. R. 141, 146 (1971).

The Manual for Courts-Martial restates these limitations on the scope of Art. 134.[22] It goes on to say that "[c]ertain disloyal statements by military personnel" may be punishable under Art. 134. "Examples are utterances designed to promote disloyalty or disaffection among troops, as praising the enemy, attacking the war aims of the United States, or denouncing our form of government." [23] Extensive additional interpretative materials are contained in the portions of the Manual devoted to Art. 134, which describe more than sixty illustrative offenses.

The Court of Military Appeals has likewise limited the scope of Art. 133. Quoting from W. Winthrop, Military Law and Precedents 711–712 (2d ed. 1920), that court has stated:

> " ' " . . . To constitute therefore the conduct here denounced, the act which forms the basis of the charge must have a double significance and effect.

[22] Manual for Courts-Martial ¶ 213c (1969).

[23] *Id.,* ¶ 213f (5).

> Though it need not amount to a crime, it must offend so seriously against law, justice, morality or decorum as to expose to disgrace, socially or as a man, the offender, and at the same time must be of such a nature or committed under such circumstances as to bring dishonor or disrepute upon the military profession which he represents.'" *United States* v. *Howe*, 17 U. S. C. M. A. 165, 177–178, 37 C. M. R. 429, 441–442 (1967).

The effect of these constructions of Arts. 133 and 134 by the Court of Military Appeals and by other military authorities has been twofold: It has narrowed the very broad reach of the literal language of the articles, and at the same time has supplied considerable specificity by way of examples of the conduct which they cover. It would be idle to pretend that there are not areas within the general confines of the articles' language which have been left vague despite these narrowing constructions. But even though sizable areas of uncertainty as to the coverage of the articles may remain after their official interpretation by authoritative military sources, further content may be supplied even in these areas by less formalized custom and usage. *Dynes* v. *Hoover*, 20 How. 65 (1857). And there also cannot be the slightest doubt under the military precedents that there is a substantial range of conduct to which both articles clearly apply without vagueness or imprecision. It is within that range that appellee's conduct squarely falls, as the Court of Appeals recognized:

> "Neither are we unmindful that the *Manual for Courts-Martial* offers as an example of an offense under Article 134, 'praising the enemy, attacking the war aims of the United States, or denouncing our form of government.' With the possible exception of the statement that 'Special Forces personnel are liars

> and thieves and killers of peasants and murderers of women and children,' it would appear that each statement for which [Levy] was court-martialed could fall within the example given in the *Manual*." 478 F. 2d, at 794.

The Court of Appeals went on to hold, however, that even though Levy's own conduct was clearly prohibited, the void-for-vagueness doctrine conferred standing upon him to challenge the imprecision of the language of the articles as they might be applied to hypothetical situations outside the considerable area within which their applicability was similarly clear.

We disagree with the Court of Appeals both in its approach to this question and in its resolution of it. This Court has on more than one occasion invalidated statutes under the Due Process Clause of the Fifth or Fourteenth Amendment because they contained no standard whatever by which criminality could be ascertained, and the doctrine of these cases has subsequently acquired the shorthand description of "void for vagueness." *Lanzetta* v. *New Jersey,* 306 U. S. 451 (1939); *Winters* v. *New York,* 333 U. S. 507 (1948). In these cases, the criminal provision is vague "not in the sense that it requires a person to conform his conduct to an imprecise but comprehensible normative standard, but rather in the sense that no standard of conduct is specified at all." *Coates* v. *City of Cincinnati,* 402 U. S. 611, 614 (1971).

But the Court of Appeals found in this case, and we agree, that Arts. 133 and 134 are subject to no such sweeping condemnation. Levy had fair notice from the language of each article that the particular conduct which he engaged in was punishable. This is a case, then, of the type adverted to in *Smith* v. *Goguen,* in which the statutes "by their terms or as authorita-

tively construed apply without question to certain activities, but whose application to other behavior is uncertain." 415 U. S., at 578. The result of the Court of Appeals' conclusion that Levy had standing to challenge the vagueness of these articles as they might be hypothetically applied to the conduct of others, even though he was squarely within their prohibitions, may stem from a blending of the doctrine of vagueness with the doctrine of overbreadth, but we do not believe it is supported by prior decisions of this Court.

We have noted in *Smith* v. *Goguen*, *id.*, at 573, that more precision in drafting may be required because of the vagueness doctrine in the case of regulation of expression. For the reasons which differentiate military society from civilian society, we think Congress is permitted to legislate both with greater breadth and with greater flexibility when prescribing the rules by which the former shall be governed than it is when prescribing rules for the latter. But each of these differentiations relates to how strict a test of vagueness shall be applied in judging a particular criminal statute. None of them suggests that one who has received fair warning of the criminality of his own conduct from the statute in question is nonetheless entitled to attack it because the language would not give similar fair warning with respect to other conduct which might be within its broad and literal ambit. One to whose conduct a statute clearly applies may not successfully challenge it for vagueness.

Because of the factors differentiating military society from civilian society, we hold that the proper standard of review for a vagueness challenge to the articles of the Code is the standard which applies to criminal statutes regulating economic affairs. Clearly, that standard is

met here, for as the Court stated in *United States* v. *National Dairy Corp.*, 372 U. S. 29, 32–33 (1963):

> "The strong presumptive validity that attaches to an Act of Congress has led this Court to hold many times that statutes are not automatically invalidated as vague simply because difficulty is found in determining whether certain marginal offenses fall within their language. *E. g., Jordan* v. *De George,* 341 U. S. 223, 231 (1951), and *United States* v. *Petrillo,* 332 U. S. 1, 7 (1947). Indeed, we have consistently sought an interpretation which supports the constitutionality of legislation. *E. g., United States* v. *Rumely,* 345 U. S. 41, 47 (1953); *Crowell* v. *Benson,* 285 U. S. 22, 62 (1932); see *Screws* v. *United States,* 325 U. S. 91 (1945).
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> "Void for vagueness simply means that criminal responsibility should not attach where one could not reasonably understand that his contemplated conduct is proscribed. *United States* v. *Harriss,* 347 U. S. 612, 617 (1954). In determining the sufficiency of the notice a statute must of necessity be examined in the light of the conduct with which a defendant is charged. *Robinson* v. *United States,* 324 U. S. 282 (1945)."

Since appellee could have had no reasonable doubt that his public statements urging Negro enlisted men not to go to Vietnam if ordered to do so were both "unbecoming an officer and a gentleman," and "to the prejudice of good order and discipline in the armed forces," in violation of the provisions of Arts. 133 and 134, respectively, his challenge to them as unconstitutionally vague under the Due Process Clause of the Fifth Amendment must fail.

We likewise reject appellee's contention that Arts. 133 and 134 are facially invalid because of their "over-

breadth." In *Gooding* v. *Wilson,* 405 U. S., at 520–521, the Court said:

> "It matters not that the words appellee used might have been constitutionally prohibited under a narrowly and precisely drawn statute. At least when statutes regulate or proscribe speech and when 'no readily apparent construction suggests itself as a vehicle for rehabilitating the statutes in a single prosecution,' *Dombrowski* v. *Pfister,* 380 U. S. 479, 491 (1965), the transcendent value to all society of constitutionally protected expression is deemed to justify allowing 'attacks on overly broad statutes with no requirement that the person making the attack demonstrate that his own conduct could not be regulated by a statute drawn with the requisite narrow specificity'. . . ."

While the members of the military are not excluded from the protection granted by the First Amendment, the different character of the military community and of the military mission requires a different application of those protections. The fundamental necessity for obedience, and the consequent necessity for imposition of discipline, may render permissible within the military that which would be constitutionally impermissible outside it. Doctrines of First Amendment overbreadth asserted in support of challenges to imprecise language like that contained in Arts. 133 and 134 are not exempt from the operation of these principles. The United States Court of Military Appeals has sensibly expounded the reason for this different application of First Amendment doctrines in its opinion in *United States* v. *Priest,* 21 U. S. C. M. A., at 570, 45 C. M. R., at 344:

> "In the armed forces some restrictions exist for reasons that have no counterpart in the ci-

> vilian community. Disrespectful and contemptuous speech, even advocacy of violent change, is tolerable in the civilian community, for it does not directly affect the capacity of the Government to discharge its responsibilities unless it both is directed to inciting imminent lawless action and is likely to produce such action. Brandenburg v. Ohio, [395 U. S. 444 (1969)]. In military life, however, other considerations must be weighed. The armed forces depend on a command structure that at times must commit men to combat, not only hazarding their lives but ultimately involving the security of the Nation itself. Speech that is protected in the civil population may nonetheless undermine the effectiveness of response to command. If it does, it is constitutionally unprotected. United States v. Gray, [20 U. S. C. M. A. 63, 42 C. M. R. 255 (1970)]."

In *Broadrick* v. *Oklahoma*, 413 U. S. 601, 610 (1973), we said that "[e]mbedded in the traditional rules governing constitutional adjudication is the principle that a person to whom a statute may constitutionally be applied will not be heard to challenge that statute on the ground that it may conceivably be applied unconstitutionally to others, in other situations not before the Court." We further commented in that case that "[i]n the past, the Court has recognized some limited exceptions to these principles, but only because of the most 'weighty countervailing policies.'" *Id.*, at 611. One of those exceptions "has been carved out in the area of the First Amendment." *Ibid.* In the First Amendment context attacks have been permitted "on overly broad statutes with no requirement that the person making the attack demonstrate that his own conduct could not be regulated by a statute drawn with the requisite narrow specificity," *Dombrowski* v. *Pfister*, 380 U. S. 479, 486 (1965).

This Court has, however, repeatedly expressed its reluctance to strike down a statute on its face where there were a substantial number of situations to which it might be validly applied. Thus, even if there are marginal applications in which a statute would infringe on First Amendment values, facial invalidation is inappropriate if the "remainder of the statute . . . covers a whole range of easily identifiable and constitutionally proscribable . . . conduct . . . ." *CSC* v. *Letter Carriers,* 413 U. S. 548, 580–581 (1973). And the Court recognized in *Broadrick, supra,* that "where conduct and not merely speech is involved" the overbreadth must "not only be real, but substantial as well, judged in relation to the statute's plainly legitimate sweep." 413 U. S., at 615. Here, as the Manual makes clear, both Art. 133 and Art. 134 do prohibit a "whole range of easily identifiable and constitutionally proscribable . . . conduct."

Both *Broadrick* and *Letter Carriers* involved basically noncriminal sanctions imposed on federal and state employees who were otherwise civilians. The Uniform Code of Military Justice applies a series of sanctions, varying from severe criminal penalties to administratively imposed minor sanctions, upon members of the military. However, for the reasons dictating a different application of First Amendment principles in the military context described above, we think that the " 'weighty countervailing policies,' " *Broadrick, supra,* at 611, which permit the extension of standing in First Amendment cases involving civilian society, must be accorded a good deal less weight in the military context.

There is a wide range of the conduct of military personnel to which Arts. 133 and 134 may be applied without infringement of the First Amendment. While there may lurk at the fringes of the articles, even in the light of their narrowing construction by the United

States Court of Military Appeals, some possibility that conduct which would be ultimately held to be protected by the First Amendment could be included within their prohibition, we deem this insufficient to invalidate either of them at the behest of appellee. His conduct, that of a commissioned officer publicly urging enlisted personnel to refuse to obey orders which might send them into combat, was unprotected under the most expansive notions of the First Amendment. Articles 133 and 134 may constitutionally prohibit that conduct, and a sufficiently large number of similar or related types of conduct so as to preclude their invalidation for overbreadth.

IV

Appellee urges that should we disagree with the Court of Appeals as to the constitutionality of Arts. 133 and 134, we should nonetheless affirm its judgment by invalidating his conviction under Art. 90. He contends that to carry out the hospital commandant's order to train aide men in dermatology would have constituted participation in a war crime, and that the commandant gave the order in question, knowing that it would be disobeyed, for the sole purpose of increasing the punishment which could be imposed upon appellee. The Court of Appeals observed that each of these defenses was recognized under the Uniform Code of Military Justice, but had been resolved against appellee on a factual basis by the court-martial which convicted him. The court went on to say that:

> "In isolation, these factual determinations adverse to appellant under an admittedly valid article are not of constitutional significance and resultantly, are beyond our scope of review." 478 F. 2d, at 797.

See *Whelchel* v. *McDonald*, 340 U. S. 122 (1950). We agree with the Court of Appeals.

Appellee in his brief here mounts a number of alternative attacks on the sentence imposed by the court-martial, attacks which were not treated by the Court of Appeals in its opinion in this case. To the extent that these points were properly presented to the District Court and preserved on appeal to the Court of Appeals, and to the extent that they are open on federal habeas corpus review of court-martial convictions under *Burns* v. *Wilson*, 346 U. S. 137 (1953), we believe they should be addressed by the Court of Appeals in the first instance.

Reversed.

MR. JUSTICE MARSHALL took no part in the consideration or decision of this case.

MR. JUSTICE BLACKMUN, with whom THE CHIEF JUSTICE joins, concurring.

I wholly concur in the Court's opinion. I write only to state what for me is a crucial difference between the majority and dissenting views in this case. My Brother STEWART complains that men of common intelligence must necessarily speculate as to what "conduct unbecoming an officer and a gentleman" or conduct to the "prejudice of good order and discipline in the armed forces" or conduct "of a nature to bring discredit upon the armed forces" really means. He implies that the average soldier or sailor would not reasonably expect, under the general articles, to suffer military reprimand or punishment for engaging in sexual acts with a chicken, or window peeping in a trailer park, or cheating while calling bingo numbers. *Post*, at 779. He argues that "times have surely changed" and that the articles are "so vague and uncertain as to be incomprehensible to the servicemen who are to be governed by them." *Post*, at 781, 788.

These assertions are, of course, no less judicial fantasy than that which the dissent charges the majority of in-

dulging. In actuality, what is at issue here are concepts of "right" and "wrong" and whether the civil law can accommodate, in special circumstances, a system of law which expects more of the individual in the context of a broader variety of relationships than one finds in civilian life.

In my judgment, times have not changed in the area of moral precepts. Fundamental concepts of right and wrong are the same now as they were under the Articles of the Earl of Essex (1642), or the British Articles of War of 1765, or the American Articles of War of 1775, or during the long line of precedents of this and other courts upholding the general articles. And, however unfortunate it may be, it is still necessary to maintain a disciplined and obedient fighting force.

A noted commentator, Professor Bishop of Yale, has recently stated that "[a]lmost all of the acts actually charged under [Articles 133 and 134], notably drug offenses, are of a sort which ordinary soldiers know, or should know, to be punishable." J. Bishop, Justice Under Fire 87–88 (1974). I agree. The subtle airs that govern the command relationship are not always capable of specification. The general articles are essential not only to punish patently criminal conduct, but also to foster an orderly and dutiful fighting force. One need only read the history of the permissive—and short-lived—regime of the Soviet Army in the early days of the Russian Revolution to know that command indulgence of an undisciplined rank and file can decimate a fighting force. Moreover, the fearful specter of arbitrary enforcement of the articles, the engine of the dissent, is disabled, in my view, by the elaborate system of military justice that Congress has provided to servicemen, and by the self-evident, and self-selective, factor that commanders who are arbitrary with their charges will not produce the effi-

cient and effective military organization this country needs and demands for its defense.

In *Fletcher* v. *United States,* 26 Ct. Cl. 541 (1891), the Court of Claims reviewed a court-martial finding that a Captain Fletcher was guilty of conduct unbecoming an officer in having, "'*with intent to defraud, failed, neglected, and refused to pay* [*one W.*] *the amount due him, though repeatedly requested to do so.*'" The court found this charged offense to come within the article. The sentiments expressed by Judge Nott, writing for the court in that case, are just as applicable to the case we decide today.

> "It must be confessed that, in the affairs of civil life and under the rules and principles of municipal law, what we ordinarily know as fraud relates to the obtaining of a man's money, and not to refusing to pay it back. It is hard for the trained lawyer to conceive of an indictment or declaration which should allege that the defendant defrauded A or B by refusing to return to him the money which he had borrowed from him. Our legal training, the legal habit of mind, as it is termed, inclines us to dissociate punishment from acts which the law does not define as offenses. As one of our greatest writers of fiction puts it, with metaphysical fitness and accurate sarcasm, as she describes one of her legal characters, 'His moral horizon was limited by the civil code of Tennessee.' That it is a fraud to obtain a man's money by dishonest representations, but not a fraud to keep it afterwards by any amount of lying and deceit, is a distinction of statutory tracing. The gambler who throws away other people's money and the spendthrift who uses it in luxurious living instead of paying it back, cheat and defraud their creditors as effectually as the knaves and sharpers who

> drift within the meshes of the criminal law. We learnt as law students in Blackstone that there are things which are *malum in se* and, in addition to them, things which are merely *malum prohibitum;* but unhappily in the affairs of real life we find that there are many things which are *malum in se* without likewise being *malum prohibitum.* In military life there is a higher code termed honor, which holds its society to stricter accountability; and it is not desirable that the standard of the Army shall come down to the requirements of a criminal code." *Id.*, at 562–563.

Relativistic notions of right and wrong, or situation ethics, as some call it, have achieved in recent times a disturbingly high level of prominence in this country, both in the guise of law reform, and as a justification of conduct that persons would normally eschew as immoral and even illegal. The truth is that the moral horizons of the American people are not footloose, or limited solely by "the civil code of Tennessee." The law should, in appropriate circumstances, be flexible enough to recognize the moral dimension of man and his instincts concerning that which is honorable, decent, and right.*

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*My Brother DOUGLAS' rendition of Captain Levy's offense in this case would leave one to believe that Levy was punished for speaking against the Vietnam war at an Army wives' tea party. In fact, Levy was convicted under charges that he, while in the performance of his duties at the United States Army Hospital in Fort Jackson, South Carolina, told the enlisted personnel in his charge that he would not train Special Forces aide men "because they are 'liars and thieves,' 'killers of peasants,' and 'murderers of women and children.'" He also stated, in the presence of patients and those performing duty under his immediate supervision, that he would refuse to go to Vietnam if ordered to do so and they should refuse to do so. Moreover, after being ordered to give dermatological training to aide men, he announced to his students that "[t]he Hospital Commander has given me an order to train special forces personnel, which order I

MR. JUSTICE DOUGLAS, dissenting.

Congress by Art. I, § 8, cl. 14, has power "To make Rules for the Government and Regulation of the land and naval Forces."

Articles 133 [1] and 134 [2] of the Uniform Code of Military Justice, 10 U. S. C. §§ 933 and 934, at issue in this case, trace their legitimacy to that power.

So far as I can discover the only express exemption of a person in the Armed Services from the protection of the Bill of Rights is that contained in the Fifth Amendment which dispenses with the need for "a presentment or indictment" of a grand jury "in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger."

By practice and by construction the words "all criminal prosecutions" in the Sixth Amendment do not necessarily cover all military trials. One result is that the guarantee of the Sixth Amendment of trial "by an impartial jury" is not applicable to military trials.[3] But Judge Fergu-

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have refused and will not obey." Unless one is to blind one's eyes in utter worship of the First Amendment, it needs no explication that these disloyal statements and actions undertaken by an officer in the course of duty, are subject to sanction.

[1] "Any commissioned officer, cadet, or midshipman who is convicted of conduct unbecoming an officer and a gentleman shall be punished as a court-martial may direct."

[2] "Though not specifically mentioned in this chapter, all disorders and neglects to the prejudice of good order and discipline in the armed forces, all conduct of a nature to bring discredit upon the armed forces, and crimes and offenses not capital, of which persons subject to this chapter may be guilty, shall be taken cognizance of by a general, special, or summary court-martial, according to the nature and degree of the offense, and shall be punished at the discretion of that court."

[3] *O'Callahan* v. *Parker*, 395 U. S. 258, 262, stated:

"If the case does not arise *'in the land or naval forces,'* then the accused gets *first*, the benefit of an indictment by a grand jury

son in *United States* v. *Tempia*, 16 U. S. C. M. A. 629, 37 C. M. R. 249, properly said: [4]

> "[B]oth the Supreme Court and this Court itself are satisfied as to the applicability of constitutional safeguards to military trials, except insofar as they are made inapplicable either expressly or by necessary implication. The Government, therefore, is correct in conceding the point, and the Judge Advocate General, United States Navy, as *amicus curiae*, is incorrect in his contrary conclusion. Indeed, as to the latter, it would appear from the authorities on which he relies that the military courts applied what we now know as the constitutional protection against self-incrimination in trials prior to and contemporaneous with the adoption of the Constitution. Hence, we find Major Andre being extended the privilege at his court-martial in 1780. Wigmore,

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and *second*, a trial by jury before a civilian court as guaranteed by the Sixth Amendment and by Art. III, § 2, of the Constitution which provides in part:

" 'The Trial of all Crimes, except in Cases of Impeachment, shall be by Jury; and such Trial shall be held in the State where the said Crimes shall have been committed; but when not committed within any State, the Trial shall be at such Place or Places as the Congress may by Law have directed.' "

[4] The Court of Military Appeals has held that the "probable cause" aspect of the Fourth Amendment is applicable to military trials. See, *e. g.*, *United States* v. *Battista*, 14 U. S. C. M. A. 70, 33 C. M. R. 282; *United States* v. *Gebhart*, 10 U. S. C. M. A. 606, 28 C. M. R. 172; *United States* v. *Brown*, 10 U. S. C. M. A. 482, 28 C. M. R. 48.

It has been held that the right to counsel under the Sixth Amendment extends to military trials, see *United States* v. *Culp*, 14 U. S. C. M. A. 199, 216–217, 219, 33 C. M. R. 411, 428–429, 431 (opinions of Quinn, C. J., Ferguson, J.).

There are rulings also that freedom of speech protects, to some extent at least, those in the Armed Services. *United States* v. *Wysong*, 9 U. S. C. M. A. 249, 26 C. M. R. 29, and see *United States* v. *Gray*, 20 U. S. C. M. A. 63, 42 C. M. R. 255.

> Evidence, 3d ed, § 2251. The same reference was made in the trial of Commodore James Barron in 1808. Proceedings of the General Court Martial Convened for the Trial of Commodore James Barron (1822), page 98. And, the Articles of War of 1776, as amended May 31, 1786, provided for objection by the judge advocate to any question put to the accused, the answer to which might tend to incriminate him. See Winthrop's Military Law and Precedents, 2d ed, 1920 Reprint, pages 196, 972." 16 U. S. C. M. A., at 634, 37 C. M. R., at 254.

But the cases we have had so far have concerned only the nature of the tribunal which may try a person and/or the procedure to be followed.[5] This is the first case that presents to us a question of what protection, if any, the First Amendment gives people in the Armed Services:

> "Congress shall make no law . . . abridging the freedom of speech, or of the press."

On its face there are no exceptions—no preferred classes for whose benefit the First Amendment extends, no exempt classes.

The military by tradition and by necessity demands discipline; and those necessities require obedience in training and in action. A command is speech brigaded with action, and permissible commands may not be disobeyed. There may be a borderland or penumbra that in time can be established by litigated cases.

I cannot imagine, however, that Congress would think it had the power to authorize the military to curtail the

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[5] See, *e. g.*, *O'Callahan* v. *Parker*, 395 U. S. 258; *McElroy* v. *United States ex rel. Guagliardo*, 361 U. S. 281; *Grisham* v. *Hagan*, 361 U. S. 278; *Kinsella* v. *United States ex rel. Singleton*, 361 U. S. 234; *Reid* v. *Covert*, 354 U. S. 1; *United States ex rel. Toth* v. *Quarles*, 350 U. S. 11; *Ex parte Quirin*, 317 U. S. 1.

reading list of books, plays, poems, periodicals, papers, and the like which a person in the Armed Services may read. Nor can I believe Congress would assume authority to empower the military to suppress conversations at a bar, ban discussions of public affairs, prevent enlisted men or women or draftees from meeting in discussion groups at times and places and for such periods of time that do not interfere with the performance of miltary duties.

Congress has taken no such step here. By Art. 133 it has allowed punishment for "conduct unbecoming an officer and a gentleman." In our society where diversities are supposed to flourish it never could be "unbecoming" to express one's views, even on the most controversial public issue.

Article 134 covers only "all disorders and neglects to the prejudice of good order and discipline in the armed forces, all conduct of a nature to bring discredit upon the armed forces."

Captain Levy, the appellee in the present case, was not convicted under Arts. 133 and 134 for failure to give the required medical instructions. But as he walked through the facilities and did his work, or met with students, he spoke of his views of the "war" in Vietnam. Thus he said:

> "The United States is wrong in being involved in the Viet Nam War. I would refuse to go to Viet Nam if ordered to do so. I don't see why any colored soldier would go to Viet Nam; they should refuse to go to Viet Nam and if sent should refuse to fight because they are discriminated against and denied their freedom in the United States, and they are sacrificed and discriminated against in Viet Nam by being given all the hazardous duty and they are suffering the majority of casualties. If I were

> a colored soldier I would refuse to go to Viet Nam and if I were a colored soldier and were sent I would refuse to fight. Special Forces personnel are liars and thieves and killers of peasants and murderers of women and children."

Those ideas affronted some of his superiors. The military, of course, tends to produce homogenized individuals who think—as well as march—in unison. In *United States* v. *Blevens*, 5 U. S. C. M. A. 480, 18 C. M. R. 104, the Court of Military Appeals upheld the court-martial conviction of a serviceman who had "affiliated" himself with a Communist organization in Germany. The serviceman argued that there was no allegation that he possessed any intent to overthrow the Government by force, so that the Smith Act, 18 U. S. C. § 2385, would not reach his conduct. The Court of Military Appeals affirmed on the theory that his affiliation, nonetheless, brought "discredit" on the Armed Forces within the meaning of Art. 134:

> "Most important to the case is the Government's contention that regardless of any deficiencies under the Smith Act, the specification properly alleges, and the evidence adequately establishes, conduct to the discredit of the armed forces, in violation of Article 134.
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> "Membership by a school teacher in an organization advocating the violent disestablishment of the United States Government has been regarded as conduct requiring dismissal. Adler v. Board of Education, 342 U. S. 485. It seems to us that such membership is even more profoundly evil in the case of a person in the military establishment. True, affiliation implies something less than membership (Bridges v. Wixon, 326 U. S. 135, 143), but the

> supreme duty of the military is the protection and security of the government and of the people. Hence, aside from a specific intent on the part of the accused to overthrow the government by violence, the conduct alleged is definitely discrediting to the armed forces." 5 U. S. C. M. A., at 483–484, 18 C. M. R., at 107–108.

The limitations on expressions of opinion by members of the military continue to date. During the Vietnam war, a second lieutenant in the reserves, off duty, out of uniform, and off base near a local university, carried a placard in an antiwar demonstration which said "END JOHNSON'S FACIST [*sic*] AGGRESSION IN VIET NAM." He was convicted by a court-martial under Art. 88 for using "contemptuous words" against the President and under Art. 133 for "conduct unbecoming an officer." The Court of Military Appeals affirmed, theorizing that suppression of such speech was essential to prevent a military "man on a white horse" from challenging "civilian control of the military." *United States* v. *Howe*, 17 U. S. C. M. A. 165, 175, 37 C. M. R. 429, 439. The Court did not attempt to weigh the likelihood that Howe, a reserve second lieutenant engaging in a single off-base expression of opinion on the most burning political issue of the day, could ever be such a "man on a white horse." Indeed, such considerations were irrelevant:

> "True, petitioner is a reserve officer, rather than a professional officer, but during the time he serves on active duty he is, and must be, controlled by the provisions of military law. In this instance, military restrictions fall upon a reluctant 'summer soldier'; but at another time, and differing circumstances, the ancient and wise provisions insuring civilian control of the military will restrict the 'man on a white horse.'" *Ibid.*

See generally Sherman, The Military Courts And Servicemen's First Amendment Rights, 22 Hastings L. J. 325 (1971.)

The power to draft an army includes, of course, the power to curtail considerably the "liberty" of the people who make it up. But Congress in these articles has not undertaken to cross the forbidden First Amendment line. Making a speech or comment on one of the most important and controversial public issues of the past two decades cannot by any stretch of dictionary meaning be included in "disorders and neglects to the prejudice of good order and discipline in the armed forces." Nor can what Captain Levy said possibly be "conduct of a nature to bring discredit upon the armed forces." He was uttering his own belief—an article of faith that he sincerely held. This was no mere ploy to perform a "subversive" act. Many others who loved their country shared his views. They were not saboteurs. Uttering one's beliefs is sacrosanct under the First Amendment.[6] Punishing the utterances is an "abridgment" of speech in the constitutional sense.

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[6] The words of Mr. Justice Holmes written in dissent in *United States* v. *Schwimmer,* 279 U. S. 644, 654–655, need to be recalled: "[T]he whole examination of the applicant shows that she holds none of the now-dreaded creeds but thoroughly believes in organized government and prefers that of the United States to any other in the world. Surely it cannot show lack of attachment to the principles of the Constitution that she thinks that it can be improved. I suppose that most intelligent people think that it might be. Her particular improvement looking to the abolition of war seems to me not materially different in its bearing on this case from a wish to establish cabinet government as in England, or a single house, or one term of seven years for the President. To touch a more burning question, only a judge mad with partisanship would exclude because the applicant thought that the Eighteenth Amendment should be repealed.

"Of course the fear is that if a war came the applicant would exert activities such as were dealt with in *Schenck* v. *United States,*

MR. JUSTICE STEWART, with whom MR. JUSTICE DOUGLAS and MR. JUSTICE BRENNAN join, dissenting.

Article 133 of the Uniform Code of Military Justice, 10 U. S. C. § 933, makes it a criminal offense to engage in "conduct unbecoming an officer and a gentleman." [1] Article 134, 10 U. S. C. § 934, makes crim-

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249 U. S. 47. But that seems to me unfounded. Her position and motives are wholly different from those of Schenck. She is an optimist and states in strong and, I do not doubt, sincere words her belief that war will disappear and that the impending destiny of mankind is to unite in peaceful leagues. I do not share that optimism nor do I think that a philosophic view of the world would regard war as absurd. But most people who have known it regard it with horror, as a last resort, and even if not yet ready for cosmopolitan efforts, would welcome any practicable combinations that would increase the power on the side of peace. The notion that the applicant's optimistic anticipations would make her a worse citizen is sufficiently answered by her examination, which seems to me a better argument for her admission than any that I can offer. Some of her answers might excite popular prejudice, but if there is any principle of the Constitution that more imperatively calls for attachment than any other it is the principle of free thought—not free thought for those who agree with us but freedom for the thought that we hate. I think that we should adhere to that principle with regard to admission into, as well as to life within this country. And recurring to the opinion that bars this applicant's way, I would suggest that the Quakers have done their share to make the country what it is, that many citizens agree with the applicant's belief and that I had not supposed hitherto that we regretted our inability to expel them because they believe more than some of us do in the teachings of the Sermon on the Mount."

That dissent by Holmes became the law when *Schwimmer, supra, United States* v. *Macintosh*, 283 U. S. 605, and *United States* v. *Bland*, 283 U. S. 636, were overruled by *Girouard* v. *United States*, 328 U. S. 61.

[1] Article 133 provides:

"Any commissioned officer, cadet, or midshipman who is convicted of conduct unbecoming an officer and a gentleman shall be punished as a court-martial may direct."

inal "all disorders and neglects to the prejudice of good order and discipline in the armed forces." and "all conduct of a nature to bring discredit upon the armed forces." [2] The Court today, reversing a unanimous judgment of the Court of Appeals, upholds the constitutionality of these statutes. I find it hard to imagine criminal statutes more patently unconstitutional than these vague and uncertain general articles, and I would, accordingly, affirm the judgment before us.

I

As many decisions of this Court make clear, vague statutes suffer from at least two fatal constitutional defects. First, by failing to provide fair notice of precisely what acts are forbidden, a vague statute "violates the first essential of due process of law." *Connally* v. *Gen-*

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[2] Article 134 provides:

"Though not specifically mentioned in this chapter, all disorders and neglects to the prejudice of good order and discipline in the armed forces, all conduct of a nature to bring discredit upon the armed forces, and crimes and offenses not capital, of which persons subject to this chapter may be guilty, shall be taken cognizance of by a general, special, or summary court-martial, according to the nature and degree of the offense, and shall be punished at the discretion of that court."

The clause in Art. 134 prohibiting all "crimes and offenses not capital" applies only to crimes and offenses proscribed by Congress. See Manual for Courts-Martial ¶ 213 (e) (1969) (hereinafter sometimes referred to as Manual). Cf. *Grafton* v. *United States*, 206 U. S. 333. As such, this clause is simply assimilative, like 18 U. S. C. § 13, and is not the subject of the vagueness attack mounted by appellee on the balance of Art. 134. See generally Wiener, Are the General Military Articles Unconsitutionally Vague?, 54 A. B. A. J. 357, 358; Note, Taps for the Real Catch-22, 81 Yale L. J. 1518 n. 3.

While only Art. 134 is expressly termed the "general article," Arts. 133 and 134 are commonly known as the "general articles" and will be so referred to herein.

eral Construction Co., 269 U. S. 385, 391. As the Court put the matter in *Lanzetta* v. *New Jersey*, 306 U. S. 451, 453: "No one may be required at peril of life, liberty or property to speculate as to the meaning of penal statutes. All are entitled to be informed as to what the State commands or forbids." "Words which are vague and fluid . . . may be as much of a trap for the innocent as the ancient laws of Caligula." *United States* v. *Cardiff*, 344 U. S. 174, 176.[3]

Secondly, vague statutes offend due process by failing to provide explicit standards for those who enforce them, thus allowing discriminatory and arbitrary enforcement. *Papachristou* v. *City of Jacksonville*, 405 U. S. 156, 165–171. "A vague law impermissibly delegates basic policy matters to policemen, judges, and juries for resolution on an *ad hoc* and subjective basis . . . ." *Grayned* v. *City of Rockford*, 408 U. S. 104, 108–109.[4] The absence of specificity in a criminal statute invites abuse on the part of prosecuting officials, who are left free to harass any individuals or groups who may be the object of official displeasure.[5]

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[3] See also *United States* v. *Harriss*, 347 U. S. 612, 617:

"The constitutional requirement of definiteness is violated by a criminal statute that fails to give a person of ordinary intelligence fair notice that his contemplated conduct is forbidden by the statute. The underlying principle is that no man shall be held criminally responsible for conduct which he could not reasonably understand to be proscribed."

[4] See also *Smith* v. *Goguen*, 415 U. S. 566, 575:

"Statutory language of such a standardless sweep allows policemen, prosecutors, and juries to pursue their personal predilections. Legislatures may not so abdicate their responsibilities for setting the standards of the criminal law."

[5] This Court has repeatedly recognized that the dangers inherent in vague statutes are magnified where laws touch upon First Amendment freedoms. See, *e. g.*, *id.*, at 573; *Grayned* v. *City of Rockford*, 408 U. S. 104, 109. In such areas, more precise statutory

It is plain that Arts. 133 and 134 are vague on their face; indeed, the opinion of the Court does not seriously contend to the contrary.[6] Men of common intelligence—including judges of both military and civilian courts—must necessarily speculate as to what such terms as "conduct unbecoming an officer and a gentleman" and "conduct of a nature to bring discredit upon the armed forces" really mean. In the past, this Court has held unconstitutional statutes penalizing "misconduct," [7] conduct that was "annoying," [8] "reprehensible," [9] or "prejudicial to the best interests" of a city,[10] and it is significant that military courts have resorted to several of these very terms in describing the sort of acts proscribed by Arts. 133 and 134.[11]

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specificity is required, lest cautious citizens steer clear of protected conduct in order to be certain of not violating the law. See generally Note, The Void-for-Vagueness Doctrine in the Supreme Court, 109 U. Pa. L. Rev. 67, 75–85.

[6] Even one of the staunchest defenders of the general articles has recognized that:

"It cannot be denied that there is language in the void-for-vagueness cases broad enough to condemn as unduly indefinite the prohibition in Article 133 against 'conduct unbecoming an officer and a gentleman' and the prohibitions in Article 134 against 'all disorders and neglects to the prejudice of good order and discipline in the armed forces' and against 'all conduct of a nature to bring discredit upon the armed forces.'" Wiener, *supra*, n. 2, at 363.

[7] *Giaccio* v. *Pennsylvania*, 382 U. S. 399.

[8] *Coates* v. *Cincinnati*, 402 U. S. 611.

[9] *Giaccio* v. *Pennsylvania*, *supra*.

[10] *Gelling* v. *Texas*, 343 U. S. 960. Other federal courts have similarly held unconstitutional statutes containing language such as "reflect[s] discredit," *Flynn* v. *Giarrusso*, 321 F. Supp. 1295 (ED La.); "offensive," *Pritikin* v. *Thurman*, 311 F. Supp. 1400 (SD Fla.); and "immoral" or "demoralizing," *Oestreich* v. *Hale*, 321 F. Supp. 445 (ED Wis.).

[11] See, *e. g.*, *United States* v. *Lee*, 4 C. M. R. 185, 191 (ABR), petition for review denied, 1 U. S. C. M. A. 713, 4 C. M. R. 173 ("repre-

Facially vague statutes may, of course, be saved from unconstitutionality by narrowing judicial construction. But I cannot conclude, as does the Court, *ante*, at 752–755, that the facial vagueness of the general articles has been cured by the relevant opinions of either the Court of Military Appeals or any other military tribunal. In attempting to give meaning to the amorphous words of the statutes, the Court of Military Appeals has repeatedly turned to Winthrop's Military Law and Precedents, an 1886 treatise. That work describes "conduct unbecoming an officer and a gentleman" in the following manner:

> "To constitute therefore the conduct here denounced, the act which forms the basis of the charge must have a double significance and effect. Though it need not amount to a crime, it must offend so seriously against law, justice, morality or decorum as to expose to disgrace, socially or as a man, the offender, and at the same time must be of such a nature or committed under such circumstances as to bring dishonor or disrepute upon the military profession which he represents." [12]

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hensible conduct"); *United States* v. *Rio Poon*, 26 C. M. R. 830, 833 (CGBR) ("universally reprehended"). See also Note, Taps for the Real Catch–22, 81 Yale L. J. 1518, 1522.

[12] W. Winthrop, Military Law and Precedents 711–712 (2d ed. 1920). The cited language is quoted in *United States* v. *Howe*, 17 U. S. C. M. A. 165, 177–178, 37 C. M. R. 429, 441–442, and in *United States* v. *Giordano*, 15 U. S. C. M. A. 163, 168, 35 C. M. R. 135, 140.

Such authoritative publications as The Officer's Guide do little better in defining "conduct unbecoming an officer and a gentleman":

"There are certain moral attributes which belong to the ideal officer and the gentleman, a lack of which is indicated by acts of dishonesty or unfair dealing, of indecency or indecorum, or of lawlessness, injustice, or cruelty. Not every one can be expected to meet ideal standards or to possess the attributes in the exact degree de-

As to the predecessor statute of Art. 134, Col. Winthrop read it as applicable to conduct whose prejudice to good order and discipline was *"reasonably direct and palpable,"* as opposed to that conduct which is simply *"indirectly or remotely"* prejudicial—whatever that may mean.[13] These passages, and the decisions of the Court of Military Appeals that adopt them verbatim, scarcely add any substantive content to the language of the general articles. At best, the limiting constructions referred to by the Court represent a valiant but unavailing effort to read some specificity into hopelessly vague laws. Winthrop's definitions may be slightly different in wording from Arts. 133 and 134, but they are not different in kind, for they suffer from the same vagueness as the statutes to which they refer.

If there be any doubt as to the absence of truly limiting constructions of the general articles, it is swiftly dispelled by even the most cursory review of convictions under them in the military courts. Article 133 has been recently employed to punish such widely disparate conduct as dishonorable failure to repay debts,[14] selling whiskey at an

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manded by the standards of his own time; but there is a limit of tolerance below which the individual standards in these respects of an officer or cadet cannot fall without his being morally unfit to be an officer or cadet or to be considered a gentleman. This article contemplates such conduct by an officer or cadet which, taking all the circumstances into consideration, satisfactorily shows such moral unfitness." R. Reynolds, The Officer's Guide 435–436 (1969 rev.). This language is substantially repeated in Manual ¶ 212.

[13] W. Winthrop, Military Law and Precedents 723 (2d ed. 1920). For cases embodying these definitions, see *United States* v. *Sadinsky*, 14 U. S. C. M. A. 563, 34 C. M. R. 343; *United States* v. *Holiday*, 4 U. S. C. M. A. 454, 16 C. M. R. 28. See also Manual ¶ 213 (b), containing identical language.

[14] *United States* v. *Journell*, 18 C. M. R. 752 (AFBR).

unconscionable price to an enlisted man,[15] cheating at cards,[16] and having an extramarital affair.[17] Article 134 has been given an even wider sweep, having been applied to sexual acts with a chicken,[18] window peeping in a trailer park,[19] and cheating while calling bingo numbers.[20] Convictions such as these leave little doubt that "[a]n infinite variety of other conduct, limited only by the scope of a commander's creativity or spleen, can be made the subject of court-martial under these articles." Sherman, The Civilianization of Military Law, 22 Maine L. Rev. 3, 80.

In short, the general articles are in practice as well as theory "catch-alls," designed to allow prosecutions for practically any conduct that may offend the sensibilities of a military commander.[21] Not every prosecution of

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[15] *United States* v. *Kupfer*, 9 C. M. R. 283 (ABR), aff'd, 3 U. S. C. M. A. 478, 13 C. M. R. 34.

[16] *United States* v. *West*, 16 C. M. R. 587 (AFBR), petition for review denied, 4 U. S. C. M. A. 744, 20 C. M. R. 398.

[17] *United States* v. *Alcantara*, 39 C. M. R. 682 (ABR), aff'd, 18 U. S. C. M. A. 372, 40 C. M. R. 84.

For a listing of other representative convictions under Art. 133, see H. Moyer, Justice and the Military 1028–1034 (1972). See also Nelson, Conduct Expected of an Officer and a Gentleman: Ambiguity, 12 AF JAG L. Rev. 124.

[18] *United States* v. *Sanchez*, 11 U. S. C. M. A. 216, 29 C. M. R. 32.

[19] *United States* v. *Clark*, 22 C. M. R. 888 (AFBR), petition for review denied, 7 U. S. C. M. A. 790, 22 C. M. R. 331.

[20] *United States* v. *Holt*, 7 U. S. C. M. A. 617, 23 C. M. R. 81.

[21] The drafters of the Manual for Courts-Martial have admitted as much, characterizing the discredit clause of Art. 134 as the "catch-all" in military law. Legal and Legislative Basis, Manual for Courts-Martial United States 294 (1951). Admitting that the language of Art. 134 is "vague," the drafters state:

"By judicial interpretation these 'vague words' have since been expanded from the narrow construction placed on them by their author to the point where they have been used as the legal justification to sustain convictions for practically any offense committed by

course, results in a conviction, and the military courts have sometimes overturned convictions when the conduct involved was so marginally related to military discipline as to offend even the loosest interpretations of the general articles.[22] But these circumstances can hardly be thought to validate the otherwise vague statutes. As the Court said in *United States* v. *Reese*, 92 U. S. 214, 221: "It would certainly be dangerous if the legislature could set a net large enough to catch all possible offenders, and leave it to the courts to step inside and say who could be rightfully detained, and who should be set at large." At best, the general articles are just such a net, and suffer from all the vices that our previous decisions condemn.

II

Perhaps in recognition of the essential vagueness of the general articles, the Court today adopts several rather periphrastic approaches to the problem before us. Whatever the apparent vagueness of these statutes to us civilians, we are told, they are models of clarity to " 'practical men in the navy and army.' " *Ante*, at 747, quoting from *Dynes* v. *Hoover*, 20 How. 65, 82. Moreover, the Court says, the appellee should have been well aware that his conduct fell within the proscriptions of the general articles, since the Manual for Courts-Martial gives specific content to these facially uncertain statutes. I be-

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one in the military service which is not either specifically denounced by some other article, or is not a crime or offense not capital or a disorder or neglect to the prejudice of good order and discipline." *Id*, at 295.

[22] See, *e. g.*, *United States* v. *Ford*, 31 C. M. R. 353 (ABR), petition for review denied, 12 U. S. C. M. A. 763, 31 C. M. R. 314 (conviction under Art. 133 for showing an allegedly obscene photograph to a friend in a private home reversed); *United States* v. *Waluski*, 6 U. S. C. M. A. 724, 21 C. M. R. 46 (conviction under Art. 134 of passenger for leaving scene of accident reversed).

lieve that neither of these propositions can withstand analysis.

A

It is true, of course, that a line of prior decisions of this Court, beginning with *Dynes* v. *Hoover, supra,* in 1858 and concluding with *Carter* v. *McClaughry,* 183 U. S. 365, in 1902, have upheld against constitutional attack the ancestors of today's general articles.[23] With all respect for the principle of *stare decisis,* however, I believe that these decisions should be given no authoritative force in view of what is manifestly a vastly "altered historic environment." *Mitchell* v. *W. T. Grant Co.,* 416 U. S. 600, 634–635 (dissenting opinion). See also *id.,* at 627–628 (POWELL, J., concurring).

It might well have been true in 1858 or even 1902 that those in the Armed Services knew, through a combination of military custom and instinct, what sorts of acts fell within the purview of the general articles. But times have surely changed. Throughout much of this country's early history, the standing army and navy numbered in the hundreds. The cadre was small, professional, and voluntary. The military was a unique society, isolated from the mainstream of civilian life, and it is at least plausible to suppose that the volunteer in that era understood what conduct was prohibited by the general articles.[24]

It is obvious that the Army into which Dr. Levy entered was far different. It was part of a military

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[23] See also *Swaim* v. *United States,* 165 U. S. 553; *United States* v. *Fletcher,* 148 U. S. 84; *Smith* v. *Whitney,* 116 U. S. 167.

[24] See generally Comment, The Discredit Clause of the UCMJ: An Unrestricted Anachronism, 18 U. C. L. A. L. Rev. 821, 833–837. Cf. Warren, The Bill of Rights and the Military, 37 N. Y. U. L. Rev. 181, 187–188; Wiener, Courts-Martial and the Bill of Rights: The Original Practice II, 72 Harv. L. Rev. 266, 292, 301–302.

establishment whose members numbered in the millions, a large percentage of whom were conscripts or draft-induced volunteers, with no prior military experience and little expectation of remaining beyond their initial period of obligation.[25] Levy was precisely such an individual, a draft-induced volunteer whose military indoctrination was minimal, at best.[26] To presume that he and others like him who served during the Vietnam era were so imbued with the ancient traditions of the military as to comprehend the arcane meaning of the general articles is to engage in an act of judicial fantasy.[27] In my view,

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[25] See Comment, 18 U. C. L. A. L. Rev., *supra*, at 836. Cf. *Avrech* v. *Secretary of the Navy*, 155 U. S. App. D. C. 352, 357, 477 F. 2d 1237, 1242 (Clark, J.), prob. juris. noted, 414 U. S. 816.

[26] The record indicates that Dr. Levy, unlike many other medical officers entering active duty, did not attend the basic military orientation course at Fort Sam Houston, Texas. Instead, he came to Fort Jackson directly from civilian life. While at Fort Jackson, he received but 16 to 26 hours of military training, only a small portion of which was devoted to military justice.

[27] The Court suggests, *ante*, at 751–752, that some of the problems with the general articles may be ameliorated by the requirement of Art. 137, 10 U. S. C. § 937, that the provisions of the Code be "carefully explained to each enlisted member at the time of his entrance on active duty, or within six days thereafter," and that they be "explained again after he has completed six months of active duty." Even assuming, *arguendo*, that it is possible to "carefully explain" the general articles, I do not believe that Art. 137 cures the vagueness of the statutes. The record in this case indicates that Dr. Levy received only a very brief amount of instruction on military justice; presumably, only a fraction of that instruction was devoted to the general articles. See n. 26, *supra*. Moreover, Army regulations indicate that only 20 minutes of instruction at the initial military justice lesson for enlisted men is devoted to Arts. 71 through 134 of the UCMJ; 49 minutes of instruction on Arts. 107 through 134 is provided for at the six-month class. Department of the Army, Army Regulation 350–212, Training, Military Justice, 2 June 1972; Army Subject Schedule No. 21–

we do a grave disservice to citizen soldiers in subjecting them to the uncertain regime of Arts. 133 and 134 simply because these provisions did not offend the sensibilities of the federal judiciary in a wholly different period of our history. In today's vastly "altered historic environment," the *Dynes* case and its progeny have become constitutional anachronisms, and I would retire them from active service.

B

The Court suggests that the Manual for Courts-Martial provides some notice of what is proscribed by the general articles, through its Appendix containing "Forms for Charges and Specifications." [28] These specimen charges, which consist of "fill-in-the-blank" accusations covering various fact situations, do offer some indication of what conduct the drafters of the Manual perceived to fall within the prohibitions of Arts. 133 and 134. There are several reasons, however, why the form specifications cannot provide the sort of definitive interpretation of the general articles necessary to save these statutes from unconstitutionality.

For one thing, the specifications covering Arts. 133 and 134 are not exclusive; the military courts have repeatedly held conduct not listed in the Manual's Appendix as nonetheless violative of the general articles.[29] Nor can it

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10, Military Justice (Enlisted Personnel Training), 24 June 1969. Obviously, only a portion of this total of 69 minutes can be set aside for instruction pertaining to the general articles. It would be myopic to pretend that such limited instruction on these amorphous criminal statutes provided military personnel with any genuine expertise on the subject, even assuming that *anybody* could *ever* acquire such expertise.

[28] Manual, App. 6*c*.

[29] See, *e. g.*, *United States* v. *Sadinsky*, 14 U. S. C. M. A. 563, 34 C. M. R. 343 (jumping from ship to sea); *United States* v. *Sanchez*, 11 U. S. C. M. A. 216, 29 C. M. R. 32 (sexual acts with a

be said that the specifications contain any common thread or unifying theme that gives generic definition to the articles' vague words; the specimen charges in the Manual list such widely disparate conduct as kicking a public horse in the belly,[30] subornation of perjury,[31] and wrongful cohabitation[32] as violative of Art. 134.[33] Moreover, the list of offenses included in the Appendix is ever-expanding; the 1951 Manual contained 59 Art. 134 offenses,[34] while the list had increased to 63 in 1969.[35] In view of the nonexclusive and transient character of the specification list, a serviceman wishing to conform his conduct to the requirements of the law would simply find definitive guidance from the Manual impossible.

More significantly, the fact that certain conduct is listed in the Manual is no guarantee that it is in violation of the general articles. The Court of Military Appeals has repeatedly emphasized that the sample specifications are only procedural guides and timesavers for military prosecutors beset by poor research facilities, and are not intended to *create* offenses under the general

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chicken). See also *Avrech* v. *Secretary of the Navy*, 155 U. S. App. D. C., at 357, 477 F. 2d, at 1242; Manual, App. 6*a*.1: Legal and Legislative Basis, Manual for Courts-Martial United States 296 (1951).

[30] Manual, App. 6*c*, Spec. 126.

[31] *Id.*, App. 6*c*, Spec. 170.

[32] *Id.*, App. 6*c*, Spec. 188.

[33] Similarly, the specifications concerning Art. 133 cover such dissimilar offenses as copying an examination paper, being drunk and disorderly, failing to pay a debt, and failure to keep a promise to pay a debt. *Id.*, App. 6*c*, Specs. 122–125. Nowhere under the Art. 133 specifications is there any mention of the conduct with which Levy was charged.

[34] *Id.*, App. 6*c*, Specs. 118–176 (1951 ed.).

[35] *Id.*, App. 6*c*, Specs. 126–188 (1969).

articles.[36] Consequently, the court has on several occasions disapproved Art. 134 convictions, despite the fact that the precise conduct at issue was listed in the form specifications as falling under that article.[37]

Despite all this, the Court indicates that Levy should have been aware that *his* conduct was violative of Art. 134, since one of the specimen charges relates to the making of statements "disloyal to the United States." [38] That specification, and the brief reference to such conduct in the text of the Manual,[39] is itself so vague and overbroad as to have been declared unconstitutional by one federal court. *Stolte* v. *Laird*, 353 F. Supp. 1392 (DC). But even if a consensus as to the meaning of the word "disloyal" were readily attainable, I am less than confident that Dr. Levy's attacks upon our Vietnam policies could be accurately characterized by such an adjective. How-

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[36] See *United States* v. *Smith*, 13 U. S. C. M. A. 105, 32 C. M. R. 105; *United States* v. *McCormick*, 12 U. S. C. M. A. 26, 30 C. M. R. 26. In these and other cases, the Court of Military Appeals has indicated its belief that Congress did not and could not empower the President to promulgate substantive rules of law for the military. See also *United States* v. *Barnes*, 14 U. S. C. M. A. 567, 34 C. M. R. 347; *United States* v. *Margelony*, 14 U. S. C. M. A. 55, 33 C. M. R. 267. Cf. *United States* v. *Acosta-Vargas*, 13 U. S. C. M. A. 388, 32 C. M. R. 388. The question as to whether the Executive has such an inherent power was apparently left open by this Court in *Reid* v. *Covert*, 354 U. S. 1, 38, and it is not necessary to resolve it in this case. It is enough to note that the Court of Military Appeals has clearly held that inclusion of specific conduct in the Manual does not necessarily mean that it is violative of the general articles. Given that position of the highest military court, I can hardly conclude that a serviceman could ever receive authoritative notice from the form specifications as to the scope of the articles.

[37] See, *e. g.*, *United States* v. *McCormick*, 12 U. S. C. M. A. 26, 30 C. M. R. 26; *United States* v. *Waluski*, 6 U. S. C. M. A. 724, 21 C. M. R. 46.

[38] Manual, App. 6*c*, Spec. 139.

[39] *Id.*, ¶ 213f (5).

ever foreign to the military atmosphere of Fort Jackson, the words spoken by him represented a viewpoint shared by many American citizens. Whatever the accuracy of these views, I would be loath to impute "disloyalty" to those who honestly held them. In short, I think it is clear that the form specification concerning disloyal statements cannot be said to have given Levy notice of the illegality of his conduct. The specimen charge is no better than the article that spawned it. It merely substitutes one set of subjective and amorphous phraseology for another.[40]

III

What has been said above indicates my view that the general articles are unconstitutionally vague under the

[40] The Court also holds that even if the general articles might be considered vague as to some offenders, the appellee has no standing to raise such a claim, since he should have known that his conduct was forbidden. *Ante*, at 755–757. To the extent that this conclusion rests on the Court's holdings that the general articles are given content through limiting judicial constructions, military custom, or the Manual for Courts-Martial, I have indicated above my disagreement with its underlying premises. And to the extent that this conclusion rests on the language of the general articles, I think that it is simply mistaken. The words of Arts. 133 and 134 are vague beyond repair; I am no more able to discern objective standards of conduct from phrases such as "conduct unbecoming an officer and a gentleman" and "conduct of a nature to bring discredit upon the armed forces" than I am from such words as "bad" or "reprehensible." Given this essential uncertainty, I cannot conclude that the statutory language clearly warned the appellee that his speech was illegal. It may have been, of course, that Dr. Levy had a subjective feeling that his conduct violated *some* military law. But that is not enough, for as we pointed out in *Bouie* v. *City of Columbia*, 378 U. S. 347, 355–356, n. 5, "[t]he determination whether a criminal statute provides fair warning of its prohibitions must be made on the basis of the statute itself and the other pertinent law, rather than on the basis of an *ad hoc* appraisal of the subjective expectations of particular defendants."

standards normally and repeatedly applied by this Court. The remaining question is whether, as the Court concludes, *ante*, at 756, the peculiar situation of the military requires application of a standard of judicial review more relaxed than that embodied in our prior decisions.

It is of course common ground that the military is a "specialized community governed by a separate discipline from that of the civilian." *Orloff* v. *Willoughby*, 345 U. S. 83, 94. A number of serviceman's individual rights must necessarily be subordinated to the overriding military mission, and I have no doubt that the military may constitutionally prohibit conduct that is quite permissible in civilian life, such as questioning the command of a superior. But this only begins the inquiry. The question before us is not whether the military may adopt substantive rules different from those that govern civilian society, but whether the serviceman has the same right as his civilian counterpart to be informed as to precisely what conduct those rules proscribe before he can be criminally punished for violating them. More specifically, the issue is whether the vagueness of the general articles is required to serve a genuine military objective.

The Solicitor General suggests that a certain amount of vagueness in the general articles is necessary in order to maintain high standards of conduct in the military, since it is impossible to predict in advance every offense that might serve to affect morale or discredit the service. It seems to me that this argument was concisely and eloquently rebutted by Judge Aldisert in the Court of Appeals, 478 F. 2d 772, 795 (CA3):

> "[W]hat high standard of conduct is served by convicting an individual of conduct he did not reasonably perceive to be criminal? Is not the essence of high standards in the military, first, knowing one's duty, and secondly, executing it? And, in this re-

> gard, would not an even higher standard be served by delineation of the various offenses under Article 134, followed by obedience to these standards?"

It may be that military necessity justifies the promulgation of substantive rules of law that are wholly foreign to civilian life, but I fail to perceive how any legitimate military goal is served by enshrouding these rules in language so vague and uncertain as to be incomprehensible to the servicemen who are to be governed by them.[41] Indeed, I should suppose that vague laws, with their serious capacity for arbitrary and discriminatory enforcement, can in the end only hamper the military's objectives of high morale and esprit de corps.

In short, I think no case has been made for finding that there is any legitimate military necessity for perpetuation of the vague and amorphous general articles. In this regard, I am not alone. No less an authority than Kenneth J. Hodson, former Judge Advocate General of the Army and Chief Judge of the Army Court of Military Review, has recommended the abolition of Art. 134 because "[w]e don't really need it, and we can't defend our use of it in this modern world." Hodson, The Manual for Courts-Martial—1984, 57 Military L. Rev. 1, 12.[42]

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[41] Cf. J. Heller, Catch–22, p. 395 (Dell ed. 1970):

"'[W]e accuse you also of the commission of crimes and infractions we don't even know about yet. Guilty or innocent?'

"'I don't know, sir. How can I say if you don't tell me what they are?'

"'How can we tell you if we don't know?'"

[42] General Hodson suggests that in place of Art. 134, the Department of Defense and various military commanders could promulgate specific sets of orders, outlawing particular conduct. Those disobeying these orders could be prosecuted under Art. 92 of the UCMJ, 10 U. S. C. § 892, which outlaws the failure to obey any lawful order. See also Note, Taps for the Real Catch–22, 81 Yale L. J. 1518, 1537–1541, containing a similar suggestion.

No different conclusion can be reached as to Art. 133. Both are anachronisms, whose legitimate military usefulness, if any, has long since disappeared.

It is perhaps appropriate to add a final word. I do not for one moment denigrate the importance of our inherited tradition that the commissioned officers of our military forces are expected to be men of honor, nor do I doubt the necessity that servicemen generally must be orderly and dutiful. An efficient and effective military organization depends in large part upon the character and quality of its personnel, particularly its leadership. The internal loyalty and mutual reliance indispensable to the ultimate effectiveness of any military organization can exist only among people who can be counted on to do their duty. It is, therefore, not only legitimate but essential that in matters of promotion, retention, duty assignment, and internal discipline, evaluations must repeatedly be made of a serviceman's basic character as reflected in his deportment, whether he be an enlisted man or a commissioned officer. But we deal here with criminal statutes. And I cannot believe that such meaningless statutes as these can be used to send men to prison under a Constitution that guarantees due process of law.

FLORIDA POWER & LIGHT CO. *v.* INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, LOCAL 641, ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 73–556. Argued April 24, 1974—Decided June 24, 1974*

A union does not commit an unfair labor practice under § 8 (b) (1) (B) of the National Labor Relations Act (NLRA) when it disciplines supervisor-members for crossing a picket line and performing rank-and-file struck work during a lawful economic strike against the employer. Pp. 798–813.

(a) Both the language and legislative history of § 8 (b) (1) (B) reflect a clear congressional concern with protecting employers in the selection of representatives to engage in two particular and explicitly stated activities, *viz.*, collective bargaining and adjustment of grievances. Therefore, a union's discipline of supervisor-members can violate § 8 (b) (1) (B) only when it may adversely affect the supervisors' conduct in performing the duties of, and acting in the capacity of, grievance adjusters or collective bargainers, in neither of which capacities the supervisors involved in these cases were acting when they crossed the picket lines to perform rank-and-file work. Pp. 802–805.

(b) The concern that to permit a union to discipline supervisor-members for performing rank-and-file work during an economic strike will deprive the employer of those supervisors' full loyalty, is a problem that Congress addressed, not through § 8 (b) (1) (B), but through §§ 2 (3), 2 (11), and 14 (a) of the NLRA, which, while permitting supervisors to become union members, assure the employer of his supervisors' loyalty by reserving in him the rights to refuse to hire union members as supervisors, to discharge supervisors for involvement in union activities or union membership, and to refuse to engage in collective bargaining with supervisors. Pp. 805–813.

159 U. S. App. D. C. 272, 487 F. 2d 1143, affirmed.

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*Together with No. 73–795, *National Labor Relations Board* v. *International Brotherhood of Electrical Workers, AFL–CIO, et al.*, also on certiorari to the same court.

STEWART, J., delivered the opinion of the Court, in which DOUGLAS, BRENNAN, MARSHALL, and POWELL, JJ., joined. WHITE, J., filed a dissenting opinion, in which BURGER, C. J., and BLACKMUN and REHNQUIST, JJ., joined, *post*, p. 813.

Ray C. Muller argued the cause and filed a brief for petitioner in No. 73–556. *Norton J. Come* argued the cause for petitioner in No. 73–795 and for respondent National Labor Relations Board in No. 73–556. With him on the brief were *Solicitor General Bork, Peter G. Nash, John S. Irving,* and *Patrick Hardin.*

Laurence J. Cohen argued the cause for respondent unions in both cases. With him on the brief were *Robert E. Fitzgerald* and *Seymour A. Gopman.*

Laurence Gold argued the cause for the American Federation of Labor and Congress of Industrial Organizations as *amicus curiae* urging affirmance. With him on the brief were *J. Albert Woll* and *Thomas E. Harris.*†

MR. JUSTICE STEWART delivered the opinion of the Court.

Section 8 (b)(1)(B) of the National Labor Relations Act, 61 Stat. 141, 29 U. S. C. § 158 (b)(1)(B), makes it an unfair labor practice for a union "to restrain or coerce . . . an employer in the selection of his representatives for the purposes of collective bargaining or the adjustment of grievances." The respondent unions in these consolidated cases called economic strikes against the employer companies. During the strikes, supervisory employees of the companies, some of whom were members of bargaining units and some of whom were not, but all of whom were union members, crossed

†*Lawrence T. Zimmerman* filed a brief for the Graphic Arts Union Employers of America, a Division of the Printing Industries of America, Inc., as *amicus curiae* urging reversal.

the picket lines and performed rank-and-file struck work, *i. e.*, work normally performed by the nonsupervisory employees then on strike. The unions later disciplined these supervisors for so doing. The question to be decided is whether the unions committed unfair labor practices under § 8 (b)(1)(B) when they disciplined their supervisor-members for crossing the picket lines and performing rank-and-file struck work during lawful economic strikes against the companies.

I

Since 1909, Local 134, International Brotherhood of Electrical Workers, AFL–CIO, one of the respondents in No. 73–795, has been recognized by the Illinois Bell Telephone Co. (Illinois Bell) and its predecessors as the exclusive bargaining representative for both rank-and-file and certain supervisory personnel, including general foremen, P. B. X. installation foremen, and building cable foremen. Rather than exercise its right to refuse to hire union members as supervisors, the company agreed to the inclusion of a union security clause in the collective-bargaining agreement which required that these supervisors, like the rank-and-file employees, maintain membership in Local 134. In addition, the bargaining agreement in effect at the time of this dispute contained provisions for the conditions of employment and certain wages of these foremen.

Other higher ranking supervisors, however, were neither represented by the union for collective-bargaining purposes nor covered by the agreement, although they were permitted to maintain their union membership.[1]

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[1] Under a Letter of Understanding signed by Illinois Bell and Local 134 in 1954 and reaffirmed in 1971, it was provided:

"As District Installation Superintendents and District Construction Supervisors their wages and conditions of employment will not

By virtue of that membership, these supervisors, like those within the bargaining units, received substantial benefits, including participation in the International's pension and death-benefit plans and in group life insurance and old-age-benefit plans sponsored by Local 134.

Under the International's constitution, all union members could be penalized for committing any of 23 enumerated offenses, including "[w]orking in the interest of any organization or cause which is detrimental to, or opposed to, the I. B. E. W.," App. 76, and "[w]orking for any individual or company declared in difficulty with a [local union] or the I. B. E. W." *Id.*, at 77.

Between May 8, 1968, and September 20, 1968, Local 134 engaged in an economic strike against the company. At the inception of the strike, Illinois Bell informed its supervisory personnel that it would like to have them come to work during the stoppage but that the decision whether or not to do so would be left to each individual, and that those who chose not to work would not be penalized. Local 134, on the other hand, warned its supervisor-members that they would be subject to disciplinary action if they performed rank-and-file work during the strike. Some of the supervisor-members crossed the union picket lines to perform rank-and-file struck work. Local 134 thereupon initiated disciplinary proceedings against these supervisors, and those found guilty were

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be a matter of union-management negotiations but they will not be required to discontinue their membership in the union as it is recognized that they have accumulated a vested interest in pension and insurance benefits as a result of their membership in the union. However, any allegiance they owe to the union shall not affect their judgment in the disposition of their supervisory duties. Since they will have under their supervision employees who are members of unions other than Local 134 and perhaps some with no union affiliations whatever, the company will expect the same impartial judgment that it demands from all Supervisory personnel." App. 113.

fined $500 each.[2] Charges were then filed with the NLRB by the Bell Supervisors Protective Association, an association formed by five supervisors to obtain counsel for and otherwise protect the supervisors who worked during the strike. The Board, one member dissenting, held that in thus disciplining the supervisory personnel, the union had violated § 8 (b)(1)(B) of the Act,[3] in accord with its decision of the same day in *Local 2150, IBEW (Wisconsin Electric Power Co.)*, 192 N. L. R. B. 77 (1971), enforced, 486 F. 2d 602 (CA7 1973), cert. pending No. 73–877, holding:

> "The Union's fining of the supervisors who were acting in the Employer's interest in performing the struck work severely jeopardized the relationship between the Employer and its supervisors.
>
> . . . . .
>
> "The purpose of Section 8 (b)(1)(B) is to assure to the employer that its selected collective-bargaining representatives will be completely faithful to its desires. This cannot be achieved if the union has an effective method, union disciplinary action, by which it can pressure such representatives to deviate from the interests of the employer. . . ." 192 N. L. R. B., at 78.

Accordingly, the Board ordered the unions to rescind the fines, to expunge all records thereof, and to reimburse the supervisors for any portions of the fines paid.

The Florida Power & Light Co. (Florida Power), the petitioner in No. 73–556, has maintained a collective-bargaining agreement with the International

[2] Local 134 also imposed fines of $1,000 upon each of the five supervisors who had formed the Bell Supervisors Protective Association.

[3] *International Brotherhood of Electrical Workers, AFL–CIO, and Local 134*, 192 N. L. R. B. 85 (1971) (hereinafter *Illinois Bell*).

Brotherhood of Electrical Workers, AFL–CIO and Locals 641, 622, 759, 820, and 1263, represented by the System Council U–4,[4] since 1953. That agreement does not require employees to become union members as a condition of employment, but many of its supervisory personnel have in fact joined the union. The company has elected to recognize the union as the exclusive bargaining representative of these supervisors, and certain aspects of their wages and conditions of employment are provided for in the agreement.[5] In addition, other higher supervisory personnel not covered by the agreement were allowed to maintain union membership,[6] and, although not represented by the union for collective-bargaining purposes, received substantial benefits as a result of their union membership, including pension, disability, and death benefits under the terms of the International's constitution.

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[4] System Council U–4 was named as a respondent in the complaint, but the Board dismissed all charges against it and entered an order only against the local unions.

[5] Supervisory employees thus included are district supervisors, assistant district supervisors, assistant supervisors, plant superintendents, plant supervisors, assistant plant superintendents, distribution assistants, results assistants, assistant plant engineers, and subsection supervisors.

[6] In both *Illinois Bell* and this case, some of the supervisors involved, though union members, did not actively participate in union affairs and paid no dues. This was because they held "honorary" withdrawal cards, permitting them to return to active membership without paying normal initiation fees in the event they returned to rank-and-file work. These cards also permitted their holders to continue participation in the International's death-benefit fund. Other supervisors held "participating" withdrawal cards under which they continued to pay a fee equal to the monthly dues and remained eligible for pension, death, and disability benefits. The holders of these cards were also not permitted to participate in other union affairs.

Since the same International union was involved in both No. 73–556 and No. 73–795, the union members of Florida Power bore the same obligations under the International's constitution as did the union members of Illinois Bell. See *supra*, at 793. With respect to union discipline of supervisor members, however, the Florida Power collective-bargaining agreement itself provided:

> "It is further agreed that employees in [supervisory] classifications have definite management responsibilities and are the direct representatives of the Company at their level of work. Employees in these classifications and any others in a supervisory capacity are not to be jacked up or disciplined through Union machinery for the acts they may have performed as supervisors in the Company's interest. The Union and the Company do not expect or intend for Union members to interfere with the proper and legitimate performance of the Foreman's management responsibilities appropriate to their classification. . . ." App. 47.

From October 22, 1969, through December 28, 1969, the International union and its locals engaged in an economic strike against Florida Power. During the strike, many of the supervisors who were union members crossed the picket lines maintained at nearly all the company's operation facilities, and performed rank-and-file work normally performed by the striking nonsupervisory employees. Following the strike, the union brought charges against those supervisors covered by the bargaining agreement as well as those not covered, alleging violations of the International union constitution. Those found guilty of crossing the picket lines to perform rank-and-file work, as opposed to their usual supervisory functions, received fines ranging from $100 to $6,000 and most were expelled from the union, thereby

terminating their right to pension, disability, and death benefits. Upon charges filed by Florida Power, the Board, in reliance upon its prior decisions in *Wisconsin Electric* and *Illinois Bell,* held that the penalties imposed "struck at the loyalty an employer should be able to expect from its representatives for the adjustment of grievances and therefore restrained and coerced employers in their selection of such representatives," in violation of § 8 (b)(1)(B) of the Act. Accordingly, the Board ordered the union to cease and desist, to rescind and refund all fines, to expunge all records of the disciplinary proceedings, and to restore those disciplined to full union membership and benefits.[7]

The *Illinois Bell* case was first heard by a panel of the Court of Appeals for the District of Columbia Circuit, 159 U. S. App. D. C. 242, 487 F. 2d 1113 (1973), and then on rehearing was consolidated with *Florida Power* and considered en banc. In a 5–4 decision, the court held that "[s]ection 8 (b)(1)(B) cannot reasonably be read to prohibit discipline of union members—supervisors though they be—for performance of rank-and-file struck work," 159 U. S. App. D. C. 272, 300, 487 F. 2d 1143, 1171 (1973), and accordingly refused to enforce the Board's orders.[8] Section 8 (b)(1)(B), the court held, was intended to proscribe only union efforts to discipline supervisors for their actions in representing management in collective bargaining and the adjustment of grievances. It was the court's view that when a supervisor forsakes his supervisory role to do work normally performed by nonsupervisory employees, he no longer acts as a managerial representative and hence "no longer merits any immunity from discipline." *Id.,* at 286, 487 F. 2d, at 1157. We granted

[7] *International Brotherhood of Electrical Workers System Council U–4,* 193 N. L. R. B. 30, 31 (1971) (hereinafter *Florida Power*).

[8] 159 U. S. App. D. C. 272, 487 F. 2d 1143 (1973).

certiorari, 414 U. S. 1156, to consider an important and novel question of federal labor law.

II

Section 8 (b) of the National Labor Relations Act provides in pertinent part:

> "It shall be an unfair labor practice for a labor organization or its agents—(1) to restrain or coerce . . . (B) an employer in the selection of his representatives for the purposes of collective bargaining or the adjustment of grievances."

The basic import of this provision was explained in the Senate Report as follows:

> "[A] union or its responsible agents could not, without violating the law, coerce an employer into joining or resigning from an employer association which negotiates labor contracts on behalf of its members; also, this subsection would not permit a union to dictate who shall represent an employer in the settlement of employee grievances, or to compel the removal of a personnel director or supervisor who has been delegated the function of settling grievances." [9]

For more than 20 years after § 8 (b)(1)(B) was enacted in 1947, the Board confined its application to situations clearly falling within the metes and bounds of the statutory language. Thus, in *Los Angeles Cloak Joint Board ILGWU (Helen Rose Co.)*, 127 N. L. R. B. 1543 (1960), the Board held that § 8 (b)(1)(B) barred a union from picketing a company in an attempt to force the employer to dismiss an industrial relations consultant thought to be hostile to the union. See also *Local*

[9] S. Rep. No. 105, 80th Cong., 1st Sess. (hereinafter Senate Report), pt. 1, p. 21 (1947).

986, Miscellaneous Warehousemen, Drivers & Helpers (Tak-Trak, Inc.), 145 N. L. R. B. 1511 (1964); *Southern California Pipe Trades District Council No. 16 (Paddock Pools of California, Inc.)*, 120 N. L. R. B. 249 (1958). Similarly, the Board held that § 8 (b)(1)(B) was violated by union attempts to force employers to join or resign from multi-employer bargaining associations, *United Slate, Tile & Composition Roofers, Local 36 (Roofing Contractors Assn. of Southern California)*, 172 N. L. R. B. 2248 (1968); *Orange Belt District Council of Painters No. 48 (Painting & Decorating Contractors of America, Inc.)*, 152 N. L. R. B. 1136 (1965); *General Teamsters Local Union No. 324 (Cascade Employers Assn., Inc.)*, 127 N. L. R. B. 488 (1960), as well as by attempts to compel employers to select foremen from the ranks of union members, *International Typographical Union & Baltimore Typographical Union No. 12 (Graphic Arts League)*, 87 N. L. R. B. 1215 (1949); *International Typographical Union (American Newspaper Publishers Assn.)*, 86 N. L. R. B. 951 (1949), enforced, 193 F. 2d 782 (CA7 1951); *International Typographical Union (Haverhill Gazette Co.)*, 123 N. L. R. B. 806 (1959), enforced, 278 F. 2d 6 (CA1 1960), aff'd by an equally divided Court, 365 U. S. 705 (1961).[10]

In 1968, however, the Board significantly expanded the reach of § 8 (b)(1)(B), with its decision in *San Fran-*

[10] The *Haverhill Gazette* case was typical. There the union had demanded the inclusion of a "foreman clause" providing that the composing room foreman, who had the power to hire, fire, and process grievances, must be a member of the union, although he would be exempted from union discipline in certain circumstances for activities on behalf of management. As the Court of Appeals pointed out: "Not only would the clause . . . limit the employers' choice of foremen to union members, but it would also give the unions power to force the discharge or demotion of a foreman by expelling him from the union." 278 F. 2d, at 12.

cisco-Oakland Mailers' Union No. 18 (Northwest Publications, Inc.), 172 N. L. R. B. 2173. In that case, three union-member foremen were expelled from the union for allegedly assigning bargaining unit work in violation of the collective-bargaining agreement. Despite the absence of union pressure or coercion aimed at securing the replacement of the foremen, the Board held that the union had violated § 8 (b)(1)(B) by seeking to influence the manner in which the foremen interpreted the contract:

> "That Respondent may have sought the substitution of attitudes rather than persons, and may have exerted its pressures upon the Charging Party by indirect rather than direct means, cannot alter the ultimate fact that pressure was exerted here for the purpose of interfering with the Charging Party's control over its representatives. Realistically, the Employer would have to replace its foremen or face *de facto* nonrepresentation by them." 172 N. L. R. B. 2173.

Subsequent Board decisions extended § 8 (b)(1)(B) to proscribe union discipline of management representatives both for the manner in which they performed their collective-bargaining and grievance-adjusting functions, and for the manner in which they performed other supervisory functions if those representatives also in fact possessed authority to bargain collectively or to adjust grievances. See *Detroit Newspaper Printing Pressmen's Union 13*, 192 N. L. R. B. 106 (1971); *Meat Cutters Union Local 81*, 185 N. L. R. B. 884 (1970), enforced, 147 U. S. App. D. C. 375, 458 F. 2d 794 (1972); *Houston Typographical Union 87*, 182 N. L. R. B. 592 (1970); *Dallas Mailers Union Local 143 (Dow Jones Co., Inc.)*, 181 N. L. R. B. 286 (1970), enforced, 144 U. S. App. D. C. 254, 445 F. 2d 730 (1971); *Sheet Metal Workers' Interna-*

tional Assn., Local Union 49 (General Metal Products, Inc.), 178 N. L. R. B. 139 (1969), enforced, 430 F. 2d 1348 (CA10 1970); *New Mexico District Council of Carpenters & Joiners of America (A. S. Horner, Inc.)*, 176 N. L. R. B. 797 and 177 N. L. R. B. 500 (1969), both enforced, 454 F. 2d 1116 (CA10 1972); *Toledo Locals Nos. 15–P & 272, Lithographers & Photoengravers International (Toledo Blade Co., Inc.)*, 175 N. L. R. B. 1072 (1969), enforced, 437 F. 2d 55 (CA6 1971).[11]

These decisions reflected a further evolution of the *Oakland Mailers* doctrine. In *Oakland Mailers,* the union had disciplined its supervisor-members for an alleged misinterpretation or misapplication of the collective-bargaining agreement, and the Board had reasoned that the natural and foreseeable effect of such discipline was that in interpreting the agreement in the future, the supervisor would be reluctant to take a position adverse to that of the union. In the subsequent cases,

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[11] In *Toledo Blade,* two supervisors were disciplined by the union for working in a crew smaller than the contractually prescribed minimum and for doing production work in excess of the contractually permitted maximum. These activities occurred during an economic strike. The Trial Examiner, in a holding which foreshadowed the cases now before us, noted that such discipline is an unwarranted interference with the employer's control over its own representatives and

"deprives the employer of the undivided loyalty of the supervisor to which it is entitled. If, therefore, the supervisor has actually been designated as the employer's bargaining or grievance representative . . . the Union's discipline of the supervisor is unquestionably a restraint upon, and coercion of the employer's continuing its selection of, and reliance upon, the supervisor as its bargaining and grievance representative." 175 N. L. R. B., at 1080–1081.

In enforcing the Board's order, the Court of Appeals noted: "This conduct of the union would further operate to make the employees reluctant in the future to take a position adverse to the union, and their usefulness to their employer would thereby be impaired." 437 F. 2d, at 57.

however, the Board held that the same coercive effect was likely to arise from the disciplining of a supervisor whenever he was engaged in management or supervisory activities, even though his collective-bargaining or grievance-adjustment duties were not involved. Through the course of these decisions, § 8 (b)(1)(B) thus began to evolve in the view of the Board and the courts "as a general prohibition of a union's disciplining supervisor-members for their conduct in the course of representing the interests of their employers." *Toledo Locals Nos. 15–P & 272, Lithographers & Photoengravers International,* 175 N. L. R. B., at 1080, or for acts "performed in the course of [their] management duties," *Meat Cutters Union Local 81* v. *NLRB,* 147 U. S. App. D. C., at 377, 458 F. 2d, at 796.[12]

In the present cases, the Board has extended that doctrine to hold that § 8 (b)(1)(B) forbids union discipline of supervisors for performance of rank-and-file work on the theory that the performance of such work during a strike is an activity furthering management's interests.[13]

[12] Indeed, in its original panel decision in the instant *Illinois Bell* case, the Court of Appeals spoke of § 8 (b)(1)(B) as prohibiting union discipline of supervisory employees "for actions performed by them within the general scope of their supervisory or managerial responsibilities." 159 U. S. App. D. C. 242, 248, 487 F. 2d 1113, 1119.

[13] As the Court of Appeals for the Seventh Circuit reasoned in enforcing the Board's order in *Wisconsin Electric:*

"What a supervisor's proper functions are when the full complement of employees is at work under the regime of a collective bargaining agreement then in force is not determinative of supervisory responsibility during a strike. Otherwise, with no employees to supervise, many supervisors would simply have no managerial responsibilities during a strike. . . . Insofar as the supervisors work to give the employer added economic leverage, they are acting as members of the management team are expected to act when the employer and union are at loggerheads in their most fundamental of disputes." 486 F. 2d 602, 608 (1973).

We agree with the Court of Appeals that § 8 (b)(1)(B) cannot be so broadly read. Both the language and the legislative history of § 8 (b)(1)(B) reflect a clearly focused congressional concern with the protection of employers in the selection of representatives to engage in two particular and explicitly stated activities, namely collective bargaining and the adjustment of grievances. By its terms, the statute proscribes only union restraint or coercion of an employer "in the selection of his representatives for the purposes of collective bargaining or the adjustment of grievances," and the legislative history makes clear that in enacting the provision Congress was exclusively concerned with union attempts to dictate to employers who would represent them in collective bargaining and grievance adjustment.

The specific concern of Congress was to prevent unions from trying to force employers into or out of multi-employer bargaining units.[14] As Senator Taft, cosponsor of the legislation, explained:

> "Under this provision it would be impossible for a union to say to a company, 'We will not bargain with you unless you appoint your national employers' association as your agent so that we can bergain nationally.' Under the bill the employer has a right to say, 'No, I will not join in national bargaining. Here is my representative, and this is the man you have to deal with.' I believe the provision is a necessary one, and one which will accomplish substantially wise purposes." 93 Cong. Rec. 3837.

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[14] Section 8 (b)(1)(B) was in fact a more restrained solution to the problem of multi-employer bargaining than originally proposed. Proposed § 9 (f)(i) of the House bill, H. R. 3020, would have prohibited multi-employer bargaining altogether, see H. R. Rep. No. 245, 80th Cong., 1st Sess. (hereinafter House Report), 8–9, 56 (1947).

That the legislative creation of this unfair labor practice was in no sense intended to cut the broad swath attributed to it by the Board in the present cases is pointed up by the further observation of Senator Taft:

> "This unfair labor practice referred to is not perhaps of tremendous importance, but employees cannot say to their employer, 'we do not like Mr. X, we will not meet Mr. X. You have to send us Mr. Y.' That has been done. It would prevent their saying to the employer, 'You have to fire Foreman Jones. We do not like Foreman Jones, and therefore you will have to fire him, or we will not go to work.' " 93 Cong. Rec. 3837.[15]

Nowhere in the legislative history is there to be found any implication that Congress sought to extend protection to the employer from union restraint or coercion when engaged in any activity other than the *selection* of its representatives for the purposes of collective bargaining and grievance adjustment. The conclusion is thus inescapable that a union's discipline of one of its members who is a supervisory employee can constitute a violation of § 8 (b)(1)(B) only when that discipline may

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[15] In a similar vein, Senator Ellender observed:

"The bill prevents a union from dictating to an employer on the question of bargaining with union representatives through an employer association. The bill, in subsection 8 (b)(1) on page 14, makes it an unfair labor practice for a union to attempt to coerce an employer either in the selection of his bargaining representative or in the selection of a personnel director or foreman, or other supervisory official. Senators who heard me discuss the issue early in the afternoon will recall that quite a few unions forced employers to change foremen. They have been taking it upon themselves to say that management should not appoint any representative who is too strict with the membership of the union. This amendment seeks to prescribe a remedy in order to prevent such interferences." 93 Cong. Rec. 4143.

adversely affect the supervisor's conduct in performing the duties of, and acting in his capacity as, grievance adjuster or collective bargainer on behalf of the employer.

We may assume without deciding that the Board's *Oakland Mailers* decision fell within the outer limits of this test, but its decisions in the present cases clearly do not. For it is certain that these supervisors were not engaged in collective bargaining or grievance adjustment, or in any activities related thereto, when they crossed union picket lines during an economic strike to engage in rank-and-file struck work.[16]

III

It is strenuously asserted, however, that to permit a union to discipline supervisor-members for performing

[16] To hold that union discipline of supervisor-members for performing rank-and-file struck work is not proscribed by § 8 (b) (1) (B) of the Act is *not* to hold that such discipline is expressly permitted by § 8 (b) (1) (A) of the Act, as construed in *NLRB* v. *Allis-Chalmers Mfg. Co.*, 388 U. S. 175 (1967). The decision in that case is inapposite where the union seeks to fine not employee-members but supervisor-members, who are explicitly excluded from the definition of "employee" by § 2 (3), 29 U. S. C. § 152 (3), and hence from the coverage of § 8 (b) (1) (A). See *Beasley* v. *Food Fair of North Carolina, Inc.*, 416 U. S. 653 (1974). The Act, therefore, neither protects nor prohibits union discipline of supervisor-members for engaging in rank-and-file struck work. In light of the fact that "Congress has been rather specific when it has come to outlaw particular economic weapons on the part of unions," *NLRB* v. *Drivers Local Union No. 639*, 362 U. S. 274, 282–283 (1960), the admonition against regulation of the choice of economic weapons that may be used as part of collective bargaining absent a particularized statutory mandate is particularly apt in this context. *NLRB* v. *Insurance Agents*, 361 U. S. 477, 490 (1960). See Summers, Disciplinary Powers of Unions, 3 Ind. & Lab. Rel. Rev. 483 (1950); Summers, Legal Limitations on Union Discipline, 64 Harv. L. Rev. 1049 (1951); Wellington, Union Democracy and Fair Representation: Federal Responsibility in a Federal System, 67 Yale L. J. 1327 (1958); Cox, Internal Affairs of Labor Unions Under the Labor Reform Act of 1959, 58 Mich. L. Rev. 819 (1960).

rank-and-file work during an economic strike will deprive the employer of the full loyalty of those supervisors. Indeed, it is precisely that concern that is reflected in these and other recent decisions of the Board holding that the statutory language "restrain or coerce . . . an employer in the selection of his representatives for the purposes of collective bargaining or the adjustment of grievances" is not confined to situations in which the union's object is to force a change in the identity of the employer's representatives, but may properly be read to encompass any situation in which the union's actions are likely to deprive the employer of the undivided loyalty of his supervisory employees. As the Board stated in *Wisconsin Electric:*

> "During the strike of the Union, the Employer clearly considered its supervisors among those it could depend on during this period. The Union's fining of the supervisors who were acting in the Employer's interest in performing the struck work severely jeopardized the relationship between the Employer and its supervisors. Thus, the fines, if found to be lawful, would now permit the Union to drive a wedge between a supervisor and the Employer, thus interfering with the performance of the duties the Employer had a right to expect the supervisor to perform. The Employer could no longer count on the complete and undivided loyalty of those it had selected to act as its collective-bargaining agents or to act for it in adjusting grievances. Moreover, such fines clearly interfere with the Employer's control over its own representatives.
>
> "The purpose of Section 8 (b)(1)(B) is to assure to the employer that its selected collective-bargaining representatives will be completely faithful to its desires. This cannot be achieved if the union has an

> effective method, union disciplinary action, by which it can pressure such representatives to deviate from the interests of the employer." 192 N. L. R. B., at 78.

The Board in the present cases echoes this view in arguing that "where a supervisor is disciplined by the union for performing other supervisory or management functions, the likely effect of such discipline is to make him subservient to the union's wishes when he performs those functions in the future. Thus, even if the effect of this discipline did not carry over to the performance of the supervisor's grievance adjustment or collective bargaining functions, the result would be to deprive the employer of the full allegiance of, and control over, a representative he has selected for grievance adjustment or collective bargaining purposes." Brief for Petitioner in No. 73–795, p. 34.

The concern expressed in this argument is a very real one, but the problem is one that Congress addressed, not through § 8(b)(1)(B), but through a completely different legislative route. Specifically, Congress in 1947 amended the definition of "employee" in § 2 (3), 29 U. S. C. § 152 (3), to exclude those denominated supervisors under § 2 (11), 29 U. S. C. § 152 (11), thereby excluding them from the coverage of the Act.[17] See

[17] Title 29 U. S. C. § 152 (3) provides in pertinent part:

"The term 'employee' shall include any employee, . . . but shall not include . . . any individual employed as a supervisor . . . ."

Title 29 U. S. C. § 152 (11) provides:

"The term 'supervisor' means any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment."

NLRB v. *Bell Aerospace Co.*, 416 U. S. 267 (1974). Further, Congress enacted § 14 (a), 29 U. S. C. § 164 (a), explicitly providing:

> "Nothing herein shall prohibit any individual employed as a supervisor from becoming or remaining a member of a labor organization, but no employer subject to this subchapter shall be compelled to deem individuals defined herein as supervisors as employees for the purpose of any law, either national or local, relating to collective bargaining."

Thus, while supervisors are permitted to become union members, Congress sought to assure the employer of the loyalty of his supervisors by reserving in him the right to refuse to hire union members as supervisors, see *Carpenters District Council* v. *NLRB*, 107 U. S. App. D. C. 55, 274 F. 2d 564 (1959); *A. H. Bull S. S. Co.* v. *National Marine Engineers' Beneficial Assn.*, 250 F. 2d 332 (CA2 1957), the right to discharge such supervisors because of their involvement in union activities or union membership, see *Beasley* v. *Food Fair of North Carolina, Inc.*, 416 U. S. 653 (1974); see also *Oil City Brass Works* v. *NLRB*, 357 F. 2d 466 (CA5 1966); *NLRB* v. *Fullerton Publishing Co.*, 283 F. 2d 545 (CA9 1960); *NLRB* v. *Griggs Equipment, Inc.*, 307 F. 2d 275 (CA5 1962); *NLRB* v. *Edward G. Budd Mfg. Co.*, 169 F. 2d 571 (CA6 1948), cert. denied, 335 U. S. 908 (1949),[18] and the right to refuse to engage in collective bargaining with them, see *L. A. Young Spring & Wire Corp.* v. *NLRB*, 82

[18] It has been held that this right is limited to the extent that an employer cannot discharge supervisory personnel for participation in the union where the discharge is found to interfere with, restrain, or coerce employees in the exercise of their protected rights, see *NLRB* v. *Talladega Cotton Factory, Inc.*, 213 F. 2d 209 (CA5 1954), or where it is prompted by the supervisors' refusal to engage in unlawful activity, see *NLRB* v. *Lowe*, 406 F. 2d 1033 (CA6 1969).

U. S. App. D. C. 327, 163 F. 2d 905 (1947), cert. denied, 333 U. S. 837 (1948).

The legislative history of §§ 2 (3) and 14 (a) of the Act clearly indicates that those provisions were enacted in response to the decision in *Packard Motor Car Co.* v. *NLRB*, 330 U. S. 485 (1947), in which this Court upheld the Board's finding that the statutory definition of "employee" included foremen, and that they were therefore entitled to the coverage of the Act in the absence of a decision by Congress to exclude them.[19] In recommending passage of this legislation, the Senate Report noted:

"*It is natural to expect that unless this Congress*

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[19] Prior to the passage of the National Labor Relations Act in 1935, foremen and rank-and-file workers were often members of the same bargaining unit, and such conflict-of-interest problems as arose were dealt with through the collective-bargaining process. After first holding that supervisors could organize in independent or affiliated unions in *Union Collieries Coal Co.*, 41 N. L. R. B. 961 (1942) and *Godchaux Sugars, Inc.*, 44 N. L. R. B. 874 (1942), the Board, concerned by the conflict of interests created thereby, reversed its position in *Maryland Drydock Co.*, 49 N. L. R. B. 733 (1943), and held that except where foremen had been organized in 1935 when the Act was passed, supervisory units were not appropriate collective-bargaining units under the Wagner Act. The Board then reversed its position again in *Packard Motor Car Co.*, 61 N. L. R. B. 4, enforced, 157 F. 2d 80 (CA6), aff'd, 330 U. S. 485 (1947), holding that supervisory employees as a class were entitled to the rights of self-organization and collective bargaining. See *NLRB* v. *Bell Aerospace Co.*, 416 U. S. 267, 277 (1974); *Beasley* v. *Food Fair of North Carolina, Inc.*, 416 U. S., at 658 n. 4. See also House Report 13–14. In discussing the proposed legislation dealing with supervisory personnel, the Senate Report stated:

"It should be noted that all that the bill does is to leave foremen in the same position in which they were until the Labor Board reversed the position it had originally taken in 1943 in the *Maryland Drydock case* (49 N. L. R. B. 733). In other words, the bill does not prevent anyone from organizing nor does it prohibit any em-

takes action, management will be deprived of the undivided loyalty of its foremen. There is an inherent tendency to subordinate their interests wherever they conflict with those of the rank and file." Senate Report 5. (Emphasis supplied.)

A similar concern with this conflict-of-loyalties problem was reflected in the House Report:

"The evidence before the committee shows clearly that unionizing supervisors under the Labor Act is inconsistent with . . . our policy to protect the rights of employers; *they, as well as workers, are entitled to loyal representatives in the plants,* but when the foremen unionize, even in a union that claims to be 'independent' of the union of the rank and file, they are subject to influence and control by the rank and file union, and, instead of their bossing the rank and file, the rank and file bosses them.

. . . . . .

"The bill does not forbid anyone to organize. It does not forbid any employer to recognize a union of foremen. Employers who, in the past, have bargained collectively with supervisors may continue to do so. What the bill does is to say what the law always has said until the Labor Board, in the exercise of what it modestly calls its 'expertness', changed the law: *That no one, whether employer or employee, need have as his agent one who is obligated to those on the other side, or one whom, for any rea-*

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ployer from recognizing a union of foremen. It merely relieves employers who are subject to the national act free from any compulsion by this National Board or any local agency to accord to the front line of management the anomalous status of employees." Senate Report 5.

son, he does not trust." House Report 14–17.[20] (Emphasis supplied.)

It is clear that the conflict-of-loyalties problem that the Board has sought to reach under § 8 (b)(1)(B) was intended by Congress to be dealt with in a very different manner.[21] As we concluded in *Beasley* v. *Food Fair of North Carolina, Inc.*, 416 U. S., at 661–662:

> "This history compels the conclusion that Congress' dominant purpose in amending §§ 2 (3) and 2 (11), and enacting § 14 (a) was to redress a perceived imbalance in labor-management relationships that was found to arise from putting supervisors in the position of serving two masters with opposed interests."

While we recognize that the legislative accommodation adopted in 1947 is fraught with difficulties of its own, "[i]t is not necessary for us to justify the policy of Congress. It is enough that we find it in the statute." *Col-*

[20] Instructive as well is the fact that §§ 2 (3) and 14 (a) were both slightly modified versions of §§ 9 (a) and (c) of the Case bill, H. R. 4908, 79th Cong., 2d Sess. (1946), which was passed by Congress in 1946 but vetoed by President Truman. See Senate Report 5. That earlier bill, however, contained no provision bearing any resemblance to § 8 (b)(1)(B), which first appeared in S. 1126, 80th Cong., 1st Sess. (1947).

[21] Further support for the proposition that § 8 (b)(1)(B) was addressed to a separate and far more limited problem than that of conflict of loyalties dealt with in §§ 2 (3), 2 (11), and 14 (a) is found in the differing scope of the provisions themselves. Section 8 (b)(1)(B) purports to cover only those selected as the employer's representative "for the purposes of collective bargaining or the adjustment of grievances," whereas the class of supervisors excluded from the definition of employees in § 2 (3) is defined by § 2 (11) to include individuals engaged in a substantially broader range of activities. See *supra*, n. 17; *NLRB* v. *Bell Aerospace Co.*, *supra*. The two groups coincide only with respect to the function of grievance adjustment.

gate-Palmolive Peet Co. v. *NLRB*, 338 U. S. 355, 363 (1949).[22]

Congress' solution was essentially one of providing the employer with an option. On the one hand, he is at liberty to demand absolute loyalty from his supervisory personnel by insisting, on pain of discharge, that they neither participate in, nor retain membership in, a labor union, see *Beasley* v. *Food Fair of North Carolina, Inc.*,

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[22] There can be no denying that the supervisors involved in the present cases found themselves in something of a dilemma, and were pulled by conflicting loyalties. But inherent in the option afforded the employer by Congress, must be the recognition that supervisors permitted by their employers to maintain union membership will necessarily incur obligations to the union. See *Nassau & Suffolk Contractors' Assn., Inc.*, 118 N. L. R. B. 174, 182 (1957). See Summers, Legal Limitations on Union Discipline, 64 Harv. L. Rev. 1049 (1951). And, while both the employer and the union may have conflicting but nonetheless legitimate expectations of loyalty from supervisor-members during a strike, the fact that the supervisor will in some measure be the beneficiary of any advantages secured by the union through the strike makes it inherently inequitable that he be allowed to function as a strikebreaker without incurring union sanctions.

The supervisor-member is, of course, not bound to retain his union membership absent a union security clause, and if, for whatever reason, he chooses to resign from the union, thereby relinquishing his union benefits, he could no longer be disciplined by the union for working during a strike. *NLRB* v. *Textile Workers*, 409 U. S. 213 (1972); *Booster Lodge 405* v. *NLRB*, 412 U. S. 84 (1973).

In these cases, the supervisors' dilemma has been somewhat exaggerated by the petitioners. In *Illinois Bell*, the company did not command its supervisors to work during the strike and expressly left the decision to each individual. Those who chose not to work were not penalized, and some were in fact promoted by their employer after the strike had ended. Those who did work during the strike but performed only their regular duties were not disciplined by the union. In *Florida Power*, the record does not disclose whether the supervisors crossed the picket lines at the company's request or not, but in any event, the union did not discipline those who did so only to perform their normal supervisory functions.

supra. Alternatively, an employer who wishes to do so can permit his supervisors to join or retain their membership in labor unions, resolving such conflicts as arise through the traditional procedures of collective bargaining.[23] But it is quite apparent, given the statutory language and the particular concerns that the legislative history shows were what motivated Congress to enact § 8(b)(1)(B), that it did not intend to make *that* provision any part of the solution to the generalized problem of supervisor-member conflict of loyalties.

For these reasons, we hold that the respondent unions did not violate § 8 (b)(1)(B) of the Act when they disciplined their supervisor-members for performing rank-and-file struck work. Accordingly, the judgment is

Affirmed.

MR. JUSTICE WHITE, with whom THE CHIEF JUSTICE, MR. JUSTICE BLACKMUN, and MR. JUSTICE REHNQUIST join, dissenting.

Believing that the majority has improperly substituted its judgment for a fair and reasonable interpretation by

[23] Thus, while a union violates § 8 (b)(1)(B) by striking to force an employer to agree to hire only union members as foremen, *International Typographical Union Local 38* v. *NLRB*, 278 F. 2d 6 (CA1 1960), aff'd by an equally divided Court, 365 U. S. 705 (1961), see n. 7, *supra*, it can propose that supervisors be covered by the collective-bargaining agreement, *Sakrete of Northern California, Inc.* v. *NLRB*, 332 F. 2d 902 (CA9 1964), cert. denied, 379 U. S. 961 (1965). Similarly, it is clear that an employer may request that supervisors be excluded from the bargaining unit, *Federal Compress & Warehouse Co.* v. *NLRB*, 398 F. 2d 631 (CA6 1968); *NLRB* v. *Coral Sportswear Co.*, 383 F. 2d 961 (CA10 1967).

The parties in *Florida Power* in fact agreed to the inclusion in the collective-bargaining agreement of provisions governing the disciplining by the union of supervisory personnel, basically providing that such matters were to be dealt with through the grievance adjustment and arbitration provisions of the agreement. See *supra*, at 796.

the Board of § 8 (b)(1)(B) in light of the statutory language and legislative history of that provision and other provisions dealing with supervisors, I must dissent substantially for the reasons expressed by the dissent below.

While it might be unreasonable for the Board to interpret § 8 (b)(1)(B) to permit an employer to require absolute loyalty from a supervisor-member in all circumstances, it is certainly apparent that during an economic strike, the supervisor's performance of rank-and-file struck work, which represents a classic "use of economic pressure by the parties to a labor dispute . . . [,] is part and parcel of the process of collective bargaining." *NLRB* v. *Insurance Agents' International Union*, 361 U. S. 477, 495 (1960).[1] "As management representatives, supervisory personnel may be requested by management to enhance the bargaining position of their employer during a dispute between it and the particular union involved." 159 U. S. App. D. C. 272, 304, 487 F. 2d 1143, 1175 (1973) (en banc) (dissenting opinion) (footnote omitted). Moreover, these union sanctions would unavoidably decrease a supervisor's loyalty to his employer and thereby materially interfere with the performance of those responsibilities which the employer quite properly demands of him. *Local Union No. 2150, IBEW (Wisconsin Electric Power Co.)*, 192 N. L. R. B. 77, 78 (1971), enforced, 486 F. 2d 602 (CA7 1973). Nothing in

[1] The court below acknowledged the practical realities of the use of supervisors during a strike: "in the highly automated public utility industries involved in these cases a small work force composed of strikebreakers and non-union management personnel can evidently provide sufficient manpower to continue vital services in a strike, thereby cutting into the strike's effectiveness." 159 U. S. App. D. C. 272, 290 n. 21, 487 F. 2d 1143, 1161 n. 21 (1973) (en banc).

the language or legislative history of the statute contradicts the conclusion that

> "[w]hen a union disciplines a supervisor for crossing a picket line to perform rank-and-file work at the request of his employer, that discipline *equally* interferes with the employer's control over his representative and *equally* deprives him of the undivided loyalty of that supervisor as in the case where the discipline was imposed because of the way the supervisor interpreted the collective bargaining agreement or performed his 'normal' supervisory duties." 159 U. S. App. D. C., at 305, 487 F. 2d, at 1176 (dissenting opinion).[2]

In a steady progression of decisions leading up to the instant cases, the Board concluded that § 8 (b)(1)(B) interdicted not only direct union pressure on an employer to replace a supervisor with collective-bargaining or grievance-adjustment functions, but also indirect coercion of an employer by means of attempting, through the application of union discipline apparatus against supervisor-members, to dictate the manner in which they would exercise their supervisory responsibilities. Far from seeing the present cases as a radical extension of this principle, I view the Board's decisions as a reasoned and realistic application of § 8 (b)(1)(B). For my part, the Board's findings are based upon substantial record evidence and enjoy "a reasonable basis in law." *NLRB* v. *Hearst Publications, Inc.*, 322 U. S. 111, 131 (1944). It may be true that special concerns prompted § 8 (b)(1)(B), but the provision, as is often the case, was written

[2] I do not read the Court to say that § 8 (b)(1)(B) would allow a union to discipline supervisor-members for performing supervisory or management functions, as opposed to customary rank-and-file work, during a labor dispute.

more broadly. Nor do I see anything in the legislative history foreclosing the Board from applying the section to prevent unions from imposing sanctions on supervisors in the circumstances present here. This Court is not a super-Board authorized to overrule an agency's choice between reasonable constructions of the controlling statute. We should not impose our views on the Board as long as it stays within the outer boundaries of the statute it is charged with administering. Respectfully, I dissent.

Syllabus

PELL ET AL. *v.* PROCUNIER, CORRECTIONS DIRECTOR, ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA

No. 73-918. Argued April 16-17, 1974—Decided June 24, 1974*

Four California prison inmates and three professional journalists brought this suit in the District Court challenging the constitutionality of a regulation, § 415.071, of the California Department of Corrections Manual, which provides that "[p]ress and other media interviews with specific individual inmates will not be permitted." That provision was promulgated following a violent prison episode that the correction authorities attributed at least in part to the former policy of free face-to-face prisoner-press interviews, which had resulted in a relatively small number of inmates gaining disproportionate notoriety and influence among their fellow inmates. The District Court granted the inmate appellees' motion for summary judgment, holding that § 415.071, insofar as it prohibited inmates from having face-to-face communication with journalists unconstitutionally infringed the inmates' First and Fourteenth Amendment freedoms. The court granted a motion to dismiss with respect to the claims of the media appellants, holding that their rights were not infringed, in view of their otherwise available rights to enter state institutions and interview inmates at random and the even broader access afforded prisoners by the court's ruling with respect to the inmate appellees. The prison officials (in No. 73-754) and the journalists (in No. 73-918) have appealed. *Held:*

1. In light of the alternative channels of communication that are open to the inmate appellees, § 415.071 does not constitute a violation of their rights of free speech. Pp. 821-828.

(a) A prison inmate retains those First Amendment rights that are not inconsistent with his status as prisoner or with the legitimate penological objectives of the corrections system, and here the restrictions on inmates' free speech rights must be balanced against the State's legitimate interest in confining prison-

*Together with No. 73-754, *Procunier, Corrections Director* v. *Hillery et al.*, also on appeal from the same court.

ers to deter crime, to protect society by quarantining criminal offenders for a period during which rehabilitative procedures can be applied, and to maintain the internal security of penal institutions. Pp. 822–824.

(b) Alternative means of communication remain open to the inmates; they can correspond by mail with persons (including media representatives), *Procunier* v. *Martinez*, 416 U. S. 396; they have rights of visitation with family, clergy, attorneys, and friends of prior acquaintance; and they have unrestricted opportunity to communicate with the press or public through their prison visitors. Pp. 824–828.

2. The rights of the media appellants under the First and Fourteenth Amendments are not infringed by § 415.071, which does not deny the press access to information available to the general public. Newsmen, under California policy, are free to visit both maximum security and minimum security sections of California penal institutions and to speak with inmates whom they may encounter, and (unlike members of the general public) are also free to interview inmates selected at random. "[T]he First Amendment does not guarantee the press a constitutional right of special access to information not available to the public generally." *Branzburg* v. *Hayes*, 408 U. S. 665, 684. Pp. 829–835.

364 F. Supp. 196, vacated and remanded.

STEWART, J., delivered the opinion of the Court, in which BURGER, C. J., and WHITE, BLACKMUN, and REHNQUIST, JJ., joined and in Part I of which POWELL, J., joined. POWELL, J., filed an opinion concurring in part and dissenting in part, *post*, p. 835. DOUGLAS, J., filed a dissenting opinion, in which BRENNAN and MARSHALL, JJ., joined, *post*, p. 836.

Herman Schwartz argued the cause for appellants in No. 73–918. With him on the briefs were *Alvin J. Bronstein* and *Melvin L. Wulf*.

John T. Murphy, Deputy Attorney General of California, argued the cause for appellees in No. 73–918 and for appellants in No. 73–754. With him on the briefs were *Evelle J. Younger*, Attorney General, *Jack R. Winkler*, Chief Assistant Attorney General, *Edward P. O'Brien*, Assistant Attorney General, and *Jean M. Bordon*, Deputy

Attorney General. *Stanley A. Bass* argued the cause for appellees in No. 73–754. With him on the brief were *Jack Greenberg* and *Charles Stephen Ralston*.†

MR. JUSTICE STEWART delivered the opinion of the Court.

These cases are here on cross-appeals from the judgment of a three-judge District Court in the Northern District of California. The plaintiffs in the District Court were four California prison inmates—Booker T. Hillery, Jr., John Larry Spain, Bobby Bly, and Michael Shane Guile—and three professional journalists—Eve Pell, Betty Segal, and Paul Jacobs. The defendants were Raymond K. Procunier, Director of the California Department of Corrections, and several subordinate officers in that department. The plaintiffs brought the suit to challenge the constitutionality, under the First and Fourteenth Amendments, of § 415.071 of the California Department of Corrections Manual, which provides that "[p]ress and other media interviews with specific individual inmates will not be permitted." They sought both injunctive and declaratory relief under 42 U. S. C. § 1983. Section 415.071 was promulgated by defendant Procunier under authority vested in him by § 5058 of the California Penal Code and is applied uniformly throughout the State's penal system to prohibit face-to-face interviews between press representatives and individual inmates whom they specifically name and request to interview.

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†Briefs of *amici curiae* in No. 73–918 were filed by *Joseph A. Califano, Jr., Charles H. Wilson, Jr., Richard M. Cooper, Daniel P. S. Paul, James W. Rodgers,* and *Robert C. Lobdell* for the Washington Post Co. et al., and by *Glen E. Clover* and *Robert J. King* for the Houston Chronicle Publishing Co. *Don H. Reuben* and *Lawrence Gunnels* filed a brief for the Chicago Tribune Co. as *amicus curiae* in both cases.

In accordance with 28 U. S. C. §§ 2281 and 2284, a three-judge court was convened to hear the case.[1]

The facts are undisputed. Pell, Segal, and Jacobs each requested permission from the appropriate corrections officials to interview inmates Spain, Bly, and Guile, respectively. In addition, the editors of a certain periodical requested permission to visit inmate Hillery to discuss the possibility of their publishing certain of his writings and to interview him concerning conditions at the prison.[2] Pursuant to § 415.071, these requests were all denied.[3] The plaintiffs thereupon sued to enjoin the continued enforcement of this regulation. The inmate plaintiffs contended that § 415.071 violates their rights of free speech

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[1] This litigation was first initiated before a single judge and proceeded for nearly a year with the court's attention focused on the interview practice at San Quentin State Penitentiary, where all the inmate plaintiffs are confined, where the interviews sought by the media plaintiffs were to occur, and where all the defendants, except Mr. Procunier, are employed. After the matter was briefed and argued, the single judge preliminarily enjoined the enforcement of § 415.071. Only then did the defendants bring to the court's attention that § 415.071 was a regulation of statewide application. Thereafter a three-judge court was convened to pass on the constitutional validity of the regulation.

[2] The periodical has since ceased publication and its editors did not join the media plaintiffs in this litigation.

[3] There is some question as to whether the interview between Hillery and the magazine editors was denied under the authority of § 415.071. Department of Corrections interview policy permits, on a case-by-case basis, meetings between inmate authors and their publishers. The defendants contend that the interview was denied here because the officials made an individualized determination that the meeting was not in fact necessary to effectuate the publication of Hillery's works. Hillery, on the other hand, notes that the editors had indicated to the prison officials that they also wished to discuss with him the conditions in the prison in order to publish an article on that subject. Thus, it appears that the denial was in all likelihood based at least in part on § 415.071.

under the First and Fourteenth Amendments. Similarly, the media plaintiffs asserted that the limitation that this regulation places on their newsgathering activity unconstitutionally infringes the freedom of the press guaranteed by the First and Fourteenth Amendments.

The District Court granted the inmate plaintiffs' motion for summary judgment, holding that § 415.071, insofar as it prohibited inmates from having face-to-face communication with journalists, unconstitutionally infringed their First and Fourteenth Amendment freedoms. With respect to the claims of the media plaintiffs, the court granted the defendants' motion to dismiss. The court noted that "[e]ven under § 415.071 as it stood before today's ruling [that inmates' constitutional rights were violated by § 415.071] the press was given the freedom to enter the California institutions and interview at random," and concluded "that the even broader access afforded prisoners by today's ruling sufficiently protects whatever rights the press may have with respect to interviews with inmates." 364 F. Supp. 196, 200.

In No. 73–754, Corrections Director Procunier and the other defendants appeal from the judgment of the District Court that § 415.071 infringes the inmate plaintiffs' First and Fourteenth Amendment rights. In No. 73–918, the media plaintiffs appeal the court's rejection of their claims. We noted probable jurisdiction of both appeals and consolidated the cases for oral argument. 414 U. S. 1127, 1155.

I

In No. 73–754, the inmate plaintiffs claim that § 415.071, by prohibiting their participation in face-to-face communication with newsmen and other members of the general public, violates their right of free speech under the First and Fourteenth Amendments. Although the constitutional right of free speech has never been

thought to embrace a right to require a journalist or any other citizen to listen to a person's views, let alone a right to require a publisher to publish those views in his newspaper, see *Avins* v. *Rutgers, State University of New Jersey*, 385 F. 2d 151 (CA3 1967); *Chicago Joint Board, Clothing Workers* v. *Chicago Tribune Co.*, 435 F. 2d 470 (CA7 1970); *Associates & Aldrich Co.* v. *Times Mirror Co.*, 440 F. 2d 133 (CA9 1971), we proceed upon the hypothesis that under some circumstances the right of free speech includes a right to communicate a person's views to any willing listener, including a willing representative of the press for the purpose of publication by a willing publisher.

We start with the familiar proposition that "[l]awful incarceration brings about the necessary withdrawal or limitation of many privileges and rights, a retraction justified by the considerations underlying our penal system." *Price* v. *Johnston*, 334 U. S. 266, 285 (1948). See also *Cruz* v. *Beto*, 405 U. S. 319, 321 (1972). In the First Amendment context a corollary of this principle is that a prison inmate retains those First Amendment rights that are not inconsistent with his status as a prisoner or with the legitimate penological objectives of the corrections system. Thus, challenges to prison restrictions that are asserted to inhibit First Amendment interests must be analyzed in terms of the legitimate policies and goals of the corrections system, to whose custody and care the prisoner has been committed in accordance with due process of law.

An important function of the corrections system is the deterrence of crime. The premise is that by confining criminal offenders in a facility where they are isolated from the rest of society, a condition that most people presumably find undesirable, they and others will be deterred from committing additional criminal offenses. This

isolation, of course, also serves a protective function by quarantining criminal offenders for a given period of time while, it is hoped, the rehabilitative processes of the corrections system work to correct the offender's demonstrated criminal proclivity. Thus, since most offenders will eventually return to society, another paramount objective of the corrections system is the rehabilitation of those committed to its custody. Finally, central to all other corrections goals is the institutional consideration of internal security within the corrections facilities themselves. It is in the light of these legitimate penal objectives that a court must assess challenges to prison regulations based on asserted constitutional rights of prisoners.

The regulation challenged here clearly restricts one manner of communication between prison inmates and members of the general public beyond the prison walls. But this is merely to state the problem, not to resolve it. For the same could be said of a refusal by corrections authorities to permit an inmate temporarily to leave the prison in order to communicate with persons outside. Yet no one could sensibly contend that the Constitution requires the authorities to give even individualized consideration to such requests. Cf. *Zemel* v. *Rusk,* 381 U. S. 1, 16–17 (1965). In order properly to evaluate the constitutionality of § 415.071, we think that the regulation cannot be considered in isolation but must be viewed in the light of the alternative means of communication permitted under the regulations with persons outside the prison. We recognize that there "may be particular qualities inherent in sustained, face-to-face debate, discussion and questioning," and "that [the] existence of other alternatives [does not] extinguis[h] altogether any constitutional interest on the part of the appellees in this particular form of access." *Kleindienst* v. *Mandel,* 408

U. S. 753, 765 (1972). But we regard the available "alternative means of [communication as] a relevant factor" in a case such as this where "we [are] called upon to balance First Amendment rights against [legitimate] governmental . . . interests." *Ibid.*

One such alternative available to California prison inmates is communication by mail. Although prison regulations, until recently, called for the censorship of statements, *inter alia,* that "unduly complain" or "magnify grievances," that express "inflammatory political, racial, religious or other views," or that were deemed "defamatory" or "otherwise inappropriate," we recently held that "the Department's regulations authorized censorship of prisoner mail far broader than any legitimate interest of penal administration demands," and accordingly affirmed a district court judgment invalidating the regulations. *Procunier* v. *Martinez,* 416 U. S. 396, 416 (1974). In addition, we held that "[t]he interest of prisoners and their correspondents in uncensored communication by letter, grounded as it is in the First Amendment, is plainly a 'liberty' interest within the meaning of the Fourteenth Amendment even though qualified of necessity by the circumstance of imprisonment." Accordingly, we concluded that any "decision to censor or withhold delivery of a particular letter must be accompanied by minimal procedural safeguards." *Id.,* at 418, 417. Thus, it is clear that the medium of written correspondence affords inmates an open and substantially unimpeded channel for communication with persons outside the prison, including representatives of the news media.

Moreover, the visitation policy of the California Corrections Department does not seal the inmate off from personal contact with those outside the prison. Inmates are permitted to receive limited visits from members

of their families, the clergy, their attorneys, and friends of prior acquaintance.[4] The selection of these categories of visitors is based on the Director's professional judgment that such visits will aid in the rehabilitation of the inmate while not compromising the other legitimate objectives of the corrections system. This is not a case in which the selection is based on the anticipated content of the communication between the inmate and the prospective visitor. If a member of the press fell within any of these categories, there is no suggestion that he would not be permitted to visit with the inmate. More importantly, however, inmates have an unrestricted opportunity to communicate with the press or any other member of the public through their families, friends, clergy, or attorneys who are permitted to visit them at the prison. Thus, this provides another alternative avenue of communication between prison inmates and persons outside the prison.

We would find the availability of such alternatives unimpressive if they were submitted as justification for governmental restriction of personal communication among members of the general public. We have recognized, however, that "[t]he relationship of state prisoners and the state officers who supervise their confinement is far more intimate than that of a State and a private

[4] This policy does not appear to be codified or otherwise expressly articulated in any generally applicable rule or regulation. The statement of visiting privileges for San Quentin State Penitentiary indicates that all visitors must be approved by the corrections officials and must be either "members of the family or friends of long standing." It also permits visits by attorneys to their clients. Although nothing is said in this statement about visits by members of the clergy, there is no dispute among the parties that the practice of the Department of Corrections is to permit such visits. There is also no disagreement among the parties that this visitation policy is generally applied by the Department throughout the state corrections system.

citizen," and that the "internal problems of state prisons involve issues . . . peculiarly within state authority and expertise." *Preiser* v. *Rodriguez,* 411 U. S. 475, 492 (1973).

In *Procunier* v. *Martinez, supra,* we could find no legitimate governmental interest to justify the substantial restrictions that had there been imposed on written communication by inmates. When, however, the question involves the entry of people into the prisons for face-to-face communication with inmates, it is obvious that institutional considerations, such as security and related administrative problems, as well as the accepted and legitimate policy objectives of the corrections system itself, require that some limitation be placed on such visitations. So long as reasonable and effective means of communication remain open and no discrimination in terms of content is involved, we believe that, in drawing such lines, "prison officials must be accorded latitude." *Cruz* v. *Beto,* 405 U. S., at 321.

In a number of contexts, we have held "that reasonable 'time, place and manner' regulations [of communicative activity] may be necessary to further significant governmental interests, and are permitted." *Grayned* v. *City of Rockford,* 408 U. S. 104, 115 (1972); *Cox* v. *New Hampshire,* 312 U. S. 569, 575–576 (1941); *Poulos* v. *New Hampshire,* 345 U. S. 395, 398 (1953); *Cox* v. *Louisiana,* 379 U. S. 536, 554–555 (1965); *Adderley* v. *Florida,* 385 U. S. 39, 46–48 (1966). "The nature of a place, the pattern of its normal activities, dictate the kinds of regulations of time, place, and manner that are reasonable." *Grayned, supra,* at 116 (internal quotation marks omitted). The "normal activity" to which a prison is committed—the involuntary confinement and isolation of large numbers of people, some of whom have demonstrated a capacity for violence—necessarily re-

quires that considerable attention be devoted to the maintenance of security. Although they would not permit prison officials to prohibit all expression or communication by prison inmates, security considerations are sufficiently paramount in the administration of the prison to justify the imposition of some restrictions on the entry of outsiders into the prison for face-to-face contact with inmates.

In this case the restriction takes the form of limiting visitations to individuals who have either a personal or professional relationship to the inmate—family, friends of prior acquaintance, legal counsel, and clergy. In the judgment of the state corrections officials, this visitation policy will permit inmates to have personal contact with those persons who will aid in their rehabilitation, while keeping visitations at a manageable level that will not compromise institutional security. Such considerations are peculiarly within the province and professional expertise of corrections officials, and, in the absence of substantial evidence in the record to indicate that the officials have exaggerated their response to these considerations, courts should ordinarily defer to their expert judgment in such matters. Courts cannot, of course, abdicate their constitutional responsibility to delineate and protect fundamental liberties. But when the issue involves a regulation limiting one of several means of communication by an inmate, the institutional objectives furthered by that regulation and the measure of judicial deference owed to corrections officials in their attempt to serve those interests are relevant in gauging the validity of the regulation.

Accordingly, in light of the alternative channels of communication that are open to prison inmates,[5] we

[5] It is suggested by the inmate appellees that the use of the mails as an alternative means of communication may not be effective in

cannot say on the record in this case that this restriction on one manner in which prisoners can communicate with persons outside of prison is unconstitutional. So long as this restriction operates in a neutral fashion, without regard to the content of the expression, it falls within the "appropriate rules and regulations" to which "prisoners necessarily are subject," *Cruz* v. *Beto, supra,* at 321, and does not abridge any First Amendment freedoms retained by prison inmates.[6]

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the case of prisoners who are inarticulate or even illiterate. There is no indication, however, that any of the four inmates before the Court suffer from either of these disabilities. Indeed, the record affirmatively shows that two of the inmates are published writers. Although the complaint was filed as a class action, the plaintiffs never moved the District Court to certify the case as a class action as required by Fed. Rules Civ. Proc. 23 (b)(3) and (c). Thus, the short answer to the inmates' contention is that there is neither a finding by the District Court nor support in the record for a finding that the alternative channels of communication are not an effective means for the inmate appellees to express themselves to persons outside the prison.

Even with respect to inmates who may not be literate or articulate, however, there is no suggestion that the corrections officials would not permit such inmates to seek the aid of fellow inmates or of family and friends who visit them to commit their thoughts to writing for communication to individuals in the general public. Cf. *Johnson* v. *Avery,* 393 U. S. 483 (1969). Merely because such inmates may need assistance to utilize one of the alternative channels does not make it an ineffective alternative, unless, of course, the State prohibits the inmate from receiving such assistance.

[6] The inmates argue that restricting their access to press representatives unconstitutionally burdens their First and Fourteenth Amendment right to petition the government for the redress of grievances. Communication with the press, the inmates contend, provides them with their only effective opportunity to communicate their grievances, through the channel of public opinion, to the legislative and executive branches of the government. We think, however, that the alternative means of communication with the press that are available to prisoners, together with the substantial access to prisons that Cali-

II

In No. 73–918, the media plaintiffs ask us to hold that the limitation on press interviews imposed by § 415.071 violates the freedom of the press guaranteed by the First and Fourteenth Amendments. They contend that, irrespective of what First Amendment liberties may or may not be retained by prison inmates, members of the press have a constitutional right to interview any inmate who is willing to speak with them, in the absence of an individualized determination that the particular interview might create a clear and present danger to prison security or to some other substantial interest served by the corrections system. In this regard, the media plaintiffs do not claim any impairment of their freedom to publish, for California imposes no restrictions on what may be published about its prisons, the prison inmates, or the officers who administer the prisons. Instead, they rely on their right to gather news without governmental interference, which the media plaintiffs assert includes a right

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fornia accords the press and other members of the public, see *infra*, at 830–831, satisfies whatever right the inmates may have to petition the goverment through the press.

We also note that California accords prison inmates substantial opportunities to petition the executive, legislative, and judicial branches of government directly. Section 2600 of the California Penal Code permits an inmate to correspond confidentially with any public officeholder. And various rules promulgated by the Department of Corrections explicitly permit an inmate to correspond with the Governor, any other elected state or federal official, and any appointed head of a state or federal agency. Similarly, California has acted to assure prisoners the right to petition for judicial relief. See, *e. g.*, *In re Jordan*, 7 Cal. 3d 930, 500 P. 2d 873 (1972); *In re Van Geldern*, 5 Cal. 3d 832, 489 P. 2d 578 (1971); *In re Harrell*, 2 Cal. 3d 675, 470 P. 2d 640 (1970). Section 845.4 of the California Government Code also makes prison officials liable for intentional interference with the right of a prisoner to obtain judicial relief from his confinement.

of access to the sources of what is regarded as newsworthy information.

We note at the outset that this regulation is not part of an attempt by the State to conceal the conditions in its prisons or to frustrate the press' investigation and reporting of those conditions. Indeed, the record demonstrates that, under current corrections policy, both the press and the general public are accorded full opportunities to observe prison conditions.[7] The Department of Corrections regularly conducts public tours through the prisons for the benefit of interested citizens. In addition, newsmen are permitted to visit both the maximum security and minimum security sections of the institutions and to stop and speak about any subject to any inmates whom they might encounter. If security considerations permit, corrections personnel will step aside to permit such interviews to be confidential. Apart from general access to all parts of the institutions, newsmen are also permitted to enter the prisons to interview inmates selected at random by the corrections officials. By the same token, if a newsman wishes to write a story on a particular prison program, he is permitted to sit in on group meetings and to interview the inmate participants. In short, members

[7] This policy reflects a recognition that the conditions in this Nation's prisons are a matter that is both newsworthy and of great public importance. As THE CHIEF JUSTICE has commented, we cannot "continue . . . to brush under the rug the problems of those who are found guilty and subject to criminal sentence. . . . It is a melancholy truth that it has taken the tragic prison outbreaks of the past three years to focus widespread public attention on this problem." Burger, Our Options are Limited, 18 Vill. L. Rev. 165, 167 (1972). Along the same lines, THE CHIEF JUSTICE has correctly observed that "[i]f we want prisoners to change, public attitudes toward prisoners and ex-prisoners must change. . . . A visit to most prisons will make you a zealot for prison reform." W. Burger, For Whom the Bell Tolls, reprinted at 25 Record of N. Y. C. B. A. (Supp.) 14, 20, 21 (1970).

of the press enjoy access to California prisons that is not available to other members of the public.

The sole limitation on newsgathering in California prisons is the prohibition in § 415.071 of interviews with individual inmates specifically designated by representatives of the press. This restriction is of recent vintage, having been imposed in 1971 in response to a violent episode that the Department of Corrections felt was at least partially attributable to the former policy with respect to face-to-face prisoner-press interviews. Prior to the promulgation of § 415.071, every journalist had virtually free access to interview any individual inmate whom he might wish. Only members of the press were accorded this privilege; other members of the general public did not have the benefit of such an unrestricted visitation policy. Thus, the promulgation of § 415.071 did not impose a discrimination against press access, but merely eliminated a special privilege formerly given to representatives of the press *vis-à-vis* members of the public generally.[8]

In practice, it was found that the policy in effect prior to the promulgation of § 415.071 had resulted in press attention being concentrated on a relatively small number of inmates who, as a result, became virtual "public figures" within the prison society and gained a disproportionate degree of notoriety and influence among their

[8] It cannot be contended that because California permits family, friends, attorneys, and clergy to visit inmates, it cannot limit visitations by the press. No member of the general public who does not have a personal or professional relationship to the inmate is permitted to enter the prison and name an inmate with whom he would like to engage in face-to-face discourse. Thus, the press is granted the same access in this respect to prison inmates as is accorded any member of the general public. Indeed, as is noted in the text, the aggregate access that the press has to California prisons and their inmates is substantially greater than that of the general public.

fellow inmates. Because of this notoriety and influence, these inmates often became the source of severe disciplinary problems. For example, extensive press attention to an inmate who espoused a practice of noncooperation with prison regulations encouraged other inmates to follow suit, thus eroding the institutions' ability to deal effectively with the inmates generally. Finally, in the words of the District Court, on August 21, 1971, "[d]uring an escape attempt at San Quentin three staff members and two inmates were killed. This was viewed by the officials as the climax of mounting disciplinary problems caused, in part, by its liberal posture with regard to press interviews, and on August 23 § 415.071 was adopted to mitigate the problem." 364 F. Supp., at 198. It is against this background that we consider the media plaintiffs' claims under the First and Fourteenth Amendments.

The constitutional guarantee of a free press "assures the maintenance of our political system and an open society," *Time, Inc.* v. *Hill*, 385 U. S. 374, 389 (1967), and secures "the paramount public interest in a free flow of information to the people concerning public officials," *Garrison* v. *Louisiana*, 379 U. S. 64, 77 (1964). See also *New York Times Co.* v. *Sullivan*, 376 U. S. 254 (1964). By the same token, "'[a]ny system of prior restraints of expression comes to this Court bearing a heavy presumption against its constitutional validity.'" *New York Times Co.* v. *United States*, 403 U. S. 713, 714 (1971); *Organization for a Better Austin* v. *Keefe*, 402 U. S. 415 (1971); *Bantam Books, Inc.* v. *Sullivan*, 372 U. S. 58, 70 (1963); *Near* v. *Minnesota ex rel. Olson*, 283 U. S. 697 (1931). Correlatively, the First and Fourteenth Amendments also protect the right of the public to receive such information and ideas as are published. *Kleindienst* v. *Mandel*, 408 U. S., at 762–763; *Stanley* v. *Georgia*, 394 U. S. 557, 564 (1969).

In *Branzburg* v. *Hayes*, 408 U. S. 665 (1972), the Court went further and acknowledged that "news gathering is not without its First Amendment protections," *id.*, at 707, for "without some protection for seeking out the news, freedom of the press could be eviscerated," *id.*, at 681. In *Branzburg* the Court held that the First and Fourteenth Amendments were not abridged by requiring reporters to disclose the identity of their confidential sources to a grand jury when that information was needed in the course of a good-faith criminal investigation. The Court there could "perceive no basis for holding that the public interest in law enforcement and in ensuring effective grand jury proceedings [was] insufficient to override the consequential, but uncertain, burden on news gathering that is said to result from insisting that reporters, like other citizens, respond to relevant questions put to them in the course of a valid grand jury investigation or criminal trial," *id.*, at 690–691.

In this case, the media plaintiffs contend that § 415.071 constitutes governmental interference with their newsgathering activities that is neither consequential nor uncertain, and that no substantial governmental interest can be shown to justify the denial of press access to specifically designated prison inmates. More particularly, the media plaintiffs assert that, despite the substantial access to California prisons and their inmates accorded representatives of the press—access broader than is accorded members of the public generally—face-to-face interviews with specifically designated inmates is such an effective and superior method of newsgathering that its curtailment amounts to unconstitutional state interference with a free press. We do not agree.

"It has generally been held that the First Amendment does not guarantee the press a constitutional right of special access to information not available to the public generally. . . . Despite the fact that news gathering may

be hampered, the press is regularly excluded from grand jury proceedings, our own conferences, the meetings of other official bodies gathering in executive session, and the meetings of private organizations. Newsmen have no constitutional right of access to the scenes of crime or disaster when the general public is excluded." *Branzburg* v. *Hayes, supra,* at 684–685. Similarly, newsmen have no constitutional right of access to prisons or their inmates beyond that afforded the general public.

The First and Fourteenth Amendments bar government from interfering in any way with a free press. The Constitution does not, however, require government to accord the press special access to information not shared by members of the public generally.[9] It is one thing to say that a journalist is free to seek out sources of information not available to members of the general public, that he is entitled to some constitutional protection of the confidentiality of such sources, cf. *Branzburg* v. *Hayes, supra,* and that government cannot restrain the publication of news emanating from such sources. Cf. *New York Times Co.* v. *United States, supra.* It is quite another thing to suggest that the Constitution imposes upon government the affirmative duty to make available to journalists sources of information not available to members of the public generally. That proposition finds no support in the words of the Constitution or in any decision

[9] As Mr. Chief Justice Warren put the matter in writing for the Court in *Zemel* v. *Rusk*, 381 U. S. 1, 16–17 (1965), "[t]here are few restrictions on action which could not be clothed by ingenious argument in the garb of decreased data flow. For example, the prohibition of unauthorized entry into the White House diminishes the citizen's opportunities to gather information he might find relevant to his opinion of the way the country is being run, but that does not make entry into the White House a First Amendment right. The right to speak and publish does not carry with it the unrestrained right to gather information."

of this Court. Accordingly, since § 415.071 does not deny the press access to sources of information available to members of the general public, we hold that it does not abridge the protections that the First and Fourteenth Amendments guarantee.

For the reasons stated, we reverse the District Court's judgment that § 415.071 infringes the freedom of speech of the prison inmates and affirm its judgment that that regulation does not abridge the constitutional right of a free press. Accordingly, the judgment is vacated, and the cases are remanded to the District Court for further proceedings consistent with this opinion.

It is so ordered.

MR. JUSTICE POWELL, concurring in part and dissenting in part.

These cross-appeals concern the constitutionality, under the First and Fourteenth Amendments, of a regulation of the California Department of Corrections that prohibits all personal interviews of prison inmates by representatives of the news media. This regulation is substantially identical to the United States Bureau of Prisons policy statement whose validity is at issue in *Saxbe* v. *Washington Post Co.*, *post*, p. 843. For the reasons stated in my dissenting opinion in that case, *post*, p. 850, I would hold that California's absolute ban against prisoner-press interviews impermissibly restrains the ability of the press to perform its constitutionally established function of informing the people on the conduct of their government. Accordingly, I dissent from the judgment of the Court.

The California cross-appeals differ from the *Washington Post* case in one significant respect. Here the constitutionality of the interview ban is challenged by prisoners as well as newsmen. Thus these appeals, unlike *Washington Post*, raise the question whether inmates as

individuals have a personal constitutional right to demand interviews with willing reporters. Because I agree with the majority that they do not, I join Part I of the opinion of the Court.

MR. JUSTICE DOUGLAS, with whom MR. JUSTICE BRENNAN and MR. JUSTICE MARSHALL join, dissenting.*

These cases involve the constitutionality, under the First and Fourteenth Amendments, of prison regulations limiting communication between state and federal prisoners and the press. Nos. 73–754 and 73–918 are cross-appeals from the judgment of a three-judge District Court for the Northern District of California. 364 F. Supp. 196. Suit was brought in that court by four California state prisoners and three professional journalists challenging the constitutionality of California Department of Corrections Manual § 415.071 which imposes an absolute ban on media interviews with individually designated inmates.

The court upheld the prisoners' claim that this regulation is violative of their right of free speech, and, in No. 73–754, the Director of the California Department of Corrections appeals from the court's injunction against further enforcement of the regulation. As to the journalists' claim, the court noted: "The media plaintiffs herein and amicus curiae argue that § 415.071 is violative of not only the prisoners' First Amendment rights, but also the press'. The court disagrees." 364 F. Supp., at 199. In No. 73–918, the journalists appeal this rejection of their claim.

No. 73–1265 involves a media challenge to Federal Bureau of Prisons Policy Statement 1220.1A, ¶ 4 (b)(6), which prohibits press interviews with any particular fed-

*[This opinion applies also to No. 73–1265, *Saxbe et al.* v. *Washington Post Co. et al.*, *post*, p. 843.]

eral prisoner in any medium security or maximum security facility. The District Court held the total ban violative of the First Amendment's free press guarantee and enjoined its enforcement. 357 F. Supp. 770. The Court of Appeals affirmed *sub nom. Washington Post Co.* v. *Kleindienst,* 161 U. S. App. D. C. 75, 494 F. 2d 994. As the majority notes, "[t]he policies of the Federal Bureau of Prisons regarding visitations to prison inmates do not differ significantly from the California policies" here under review.

I

In analyzing the prisoner challenge to California's absolute ban on media interviews with individual inmates, I start with the proposition that "foremost among the Bill of Rights of prisoners in this country, whether under state or federal detention, is the First Amendment. Prisoners are still 'persons' entitled to all constitutional rights unless their liberty has been constitutionally curtailed by procedures that satisfy all the requirements of due process. . . . Free speech and press within the meaning of the First Amendment are, in my judgment, among the pre-eminent privileges and immunities of all citizens." *Procunier* v. *Martinez,* 416 U. S. 396, 428–429 (DOUGLAS, J., concurring in judgment). With that premise, I cannot agree with the Court that California's grossly overbroad restrictions on prisoner speech are constitutionally permissible. I agree that prison discipline, inmate safety, and rehabilitation must be considered in evaluating First Amendment rights in the prison context. First Amendment principles must always be applied "in light of the special characteristics of the . . . environment." *Tinker* v. *Des Moines School District,* 393 U. S. 503, 506; *Healy* v. *James,* 408 U. S. 169, 180. But the prisoners here do not contend that prison officials are powerless to impose reasonable limitations on

visits by the media which are necessary in particularized circumstances to maintain security, discipline, and good order.

All that the prisoners contend, and all that the courts below found, is that these penal interests cannot be used as a justification for an absolute ban on media interviews because "[b]road prophylactic rules in the area of free expression are suspect. . . . Precision of regulation must be the touchstone in an area so closely touching our most precious freedoms." *NAACP* v. *Button*, 371 U. S. 415, 438. And see *Cantwell* v. *Connecticut*, 310 U. S. 296, 311.

It is true that the prisoners are left with other means of expression such as visits by relatives and communication by mail. But the State can hardly defend an overly broad restriction on expression by demonstrating that it has not eliminated expression completely.

As Mr. Justice Black has said:

> "I cannot accept my Brother HARLAN'S view [in dissent] that the abridgment of speech and press here does not violate the First Amendment because other methods of communication are left open. This reason for abridgment strikes me as being on a par with holding that governmental suppression of a newspaper in a city would not violate the First Amendment because there continue to be radio and television stations. First Amendment freedoms can no more validly be taken away by degrees than by one fell swoop." *NLRB* v. *Fruit Packers*, 377 U. S. 58, 79–80 (concurring opinion).

A State might decide that criticism of its affairs could be reduced by prohibiting all its employees from discussing governmental operations in interviews with the media, leaving criticism of the State to those with the time, energy, ability, and inclination to communicate

through the mails. The prohibition here is no less offensive to First Amendment principles; it flatly prohibits interview communication with the media on the government's penal operations by the only citizens with the best knowledge and real incentive to discuss them.

I agree with the court below that the State's interest in order and prison discipline cannot justify its total ban on all media interviews with any individually designated inmate on any matter whatsoever. Such a coarse attempt at regulation is patently unconstitutional in an area where "[p]recision of regulation must be the touchstone." *NAACP* v. *Button, supra,* at 438; *Elfbrandt* v. *Russell,* 384 U. S. 11, 18. I would affirm the District Court's judgment in this regard.

II

In Nos. 73–918 and 73–1265, the media claim that the state and federal prison regulations here, by flatly prohibiting interviews with inmates selected by the press, impinge upon the First Amendment's free press guarantee, directly protected against federal infringement and protected against state infringement by the Fourteenth Amendment. In rejecting the claim, the Court notes that the ban on access to prisoners applies as well to the general public, and it holds that "newsmen have no constitutional right of access to prisons or their inmates beyond that afforded the general public." *Ante,* at 834.

In dealing with the free press guarantee, it is important to note that the interest it protects is not possessed by the media themselves. In enjoining enforcement of the federal regulation in No. 73–1265, Judge Gesell did not vindicate any right of the Washington Post, but rather the right of the people, the true sovereign under our constitutional scheme, to govern in

an informed manner. "The press has a preferred position in our constitutional scheme, not to enable it to make money, not to set newsmen apart as a favored class, but to bring fulfillment to the public's right to know. The right to know is crucial to the governing powers of the people." *Branzburg* v. *Hayes*, 408 U. S. 665, 721 (DOUGLAS, J., dissenting).

Prisons, like all other public institutions, are ultimately the responsibility of the populace. Crime, like the economy, health, education, defense, and the like, is a matter of grave concern in our society and people have the right and the necessity to know not only of the incidence of crime but of the effectiveness of the system designed to control it. "On any given day, approximately 1,500,000 people are under the authority of [federal, state and local prison] systems. The cost to taxpayers is over one billion dollars annually. Of those individuals sentenced to prison, 98% will return to society." [1] The public's interest in being informed about prisons is thus paramount.

As with the prisoners' free speech claim, no one asserts that the free press right is such that the authorities are powerless to impose reasonable regulations as to the time, place, and manner of interviews to effectuate prison discipline and order. The only issue here is whether the complete ban on interviews with inmates selected by the press goes beyond what is necessary for the protection of these interests and infringes upon our cherished right of a free press. As the Court of Appeals noted in No. 73–1265: "[W]hile we do not question that the concerns

[1] Subcommittee on Courts, Civil Liberties, and the Administration of Justice of the House Committee on the Judiciary, 93d Cong., 2d Sess., Report on the Inspection of Federal Facilities at Leavenworth Penitentiary and the Medical Center for Federal Prisoners 2 (Comm. Print 1974).

voiced by the Bureau [of Prisons] are legitimate interests that merit protection, we must agree with the District Court that they do not, individually or in total, justify the sweeping absolute ban that the Bureau has chosen to impose." 161 U. S. App. D. C., at 86, 494 F. 2d, at 1005.

It is thus not enough to note that the press—the institution which "[t]he Constitution specifically selected . . . to play an important role in the discussion of public affairs" [2]—is denied no more access to the prisons than is denied the public generally. The prohibition of visits by the public has no practical effect upon their right to know beyond that achieved by the exclusion of the press. The average citizen is most unlikely to inform himself about the operation of the prison system by requesting an interview with a particular inmate with whom he has no prior relationship. He is likely instead, in a society which values a free press, to rely upon the media for information.

It is indeed ironic for the Court to justify the exclusion of the press by noting that the government has gone beyond the press and expanded the exclusion to include the public. Could the government deny the press access to all public institutions and prohibit interviews with all governmental employees? Could it find constitutional footing by expanding the ban to deny such access to everyone?

I agree with the courts below in No. 73–1265 that the absolute ban on press interviews with specifically designated federal inmates is far broader than is necessary to protect any legitimate governmental interests and is an unconstitutional infringement on the public's right to know protected by the free press guarantee of the First Amendment. I would affirm the judgment in this re-

[2] *Mills* v. *Alabama*, 384 U. S. 214, 219.

gard. Since this basic right is guaranteed against state infringement by the application of the First Amendment to the States through the Fourteenth,[3] California's absolute ban can fare no better. I would reverse the District Court's rejection of this claim in No. 73–918.

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[3] "While Mr. Chief Justice Hughes in *Stromberg* v. *California*, 283 U. S. 359, stated that the First Amendment was applicable to the States by reason of the Due Process Clause of the Fourteenth, it has become customary to rest on the broader foundation of the entire Fourteenth Amendment. Free speech and press within the meaning of the First Amendment is, in my judgment, one of the pre-eminent privileges and immunities of all citizens." *Procunier* v. *Martinez*, 416 U. S. 396, 428–429 (DOUGLAS, J., concurring in judgment).

Syllabus

SAXBE, ATTORNEY GENERAL, ET AL. *v.* WASHINGTON POST CO. ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 73-1265. Argued April 17, 1974—Decided June 24, 1974

The Policy Statement of the Federal Bureau of Prisons prohibiting personal interviews between newsmen and individually designated inmates of federal medium security and maximum security prisons does not abridge the freedom of the press that the First Amendment guarantees, *Pell* v. *Procunier, ante,* p. 817, since it "does not deny the press access to sources of information available to members of the general public," but is merely a particularized application of the general rule that nobody may enter the prison and designate an inmate whom he would like to visit, unless the prospective visitor is a lawyer, clergyman, relative, or friend of that inmate. Pp. 846-850.

161 U. S. App. D. C. 75, 494 F. 2d 994, reversed and remanded.

STEWART, J., delivered the opinion of the Court, in which BURGER, C. J., and WHITE, BLACKMUN, and REHNQUIST, JJ., joined. DOUGLAS, J., filed a dissenting opinion, *ante,* p. 836. POWELL, J., filed a dissenting opinion, in which BRENNAN and MARSHALL, JJ., joined, *post,* p. 850.

Solicitor General Bork argued the cause for petitioners. With him on the brief were *Acting Assistant Attorney General Jaffe, Edmund W. Kitch,* and *Leonard Schaitman.*

Joseph A. Califano, Jr., argued the cause for respondents. With him on the brief were *Charles H. Wilson, Jr.,* and *Richard M. Cooper.**

**William H. Allen* filed a brief for the Reporters Committee for Freedom of the Press Legal Defense and Research Fund as *amicus curiae* urging affirmance.

MR. JUSTICE STEWART delivered the opinion of the Court.

The respondents, a major metropolitan newspaper and one of its reporters, initiated this litigation to challenge the constitutionality of ¶ 4b (6) of Policy Statement 1220.1A of the Federal Bureau of Prisons.[1] At the time that the case was in the District Court and the Court of Appeals, this regulation prohibited any personal interviews between newsmen and individually designated federal prison inmates. The Solicitor General has informed the Court that the regulation was recently amended "to permit press interviews at federal prison institutions that can be characterized as minimum security."[2] The general prohibition of press interviews with inmates remains in effect, however, in three-quarters of the federal prisons, *i. e.*, in all medium security and maximum security institutions, including the two institutions involved in this case.

In March 1972, the respondents requested permission from the petitioners, the officials responsible for administering federal prisons, to conduct several interviews with specific inmates in the prisons at Lewisburg, Pennsylvania, and Danbury, Connecticut. The petitioners denied permission for such interviews on the authority of Policy Statement 1220.1A. The respondents thereupon commenced this suit to challenge these denials and the regulation on which they were predicated. Their essential contention was that the prohibition of all press interviews

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[1] "Press representatives will not be permitted to interview individual inmates. This rule shall apply even where the inmate requests or seeks an interview. However, conversation may be permitted with inmates whose identity is not to be made public, if it is limited to the discussion of institutional facilities, programs and activities."

[2] Letter of Apr. 16, 1974, to Clerk, Supreme Court of the United States, presently on file with the Clerk.

with prison inmates abridges the protection that the First Amendment accords the newsgathering activity of a free press. The District Court agreed with this contention and held that the Policy Statement, insofar as it totally prohibited all press interviews at the institutions involved, violated the First Amendment. Although the court acknowledged that institutional considerations could justify the prohibition of some press-inmate interviews, the District Court ordered the petitioners to cease enforcing the blanket prohibition of all such interviews and, pending modification of the Policy Statement, to consider interview requests on an individual basis and "to withhold permission to interview . . . only where demonstrable administrative or disciplinary considerations dominate." 357 F. Supp. 770, 775 (DC 1972).

The petitioners appealed the District Court's judgment to the Court of Appeals for the District of Columbia Circuit. We stayed the District Court's order pending the completion of that appeal, *sub nom. Kleindienst* v. *Washington Post Co.*, 406 U. S. 912 (1972). The first time this case was before it, the Court of Appeals remanded it to the District Court for additional findings of fact and particularly for reconsideration in light of this Court's intervening decision in *Branzburg* v. *Hayes*, 408 U. S. 665 (1972). 155 U. S. App. D. C. 283, 477 F. 2d 1168 (1972). On remand, the District Court conducted further evidentiary hearings, supplemented its findings of fact, and reconsidered its conclusions of law in light of *Branzburg* and other recent decisions that were urged upon it. In due course, the court reaffirmed its original decision, 357 F. Supp. 779 (DC 1972), and the petitioners again appealed to the Court of Appeals.

The Court of Appeals affirmed the judgment of the District Court. It held that press interviews with prison inmates could not be totally prohibited as the Policy

Statement purported to do, but may "be denied only where it is the judgment of the administrator directly concerned, based on either the demonstrated behavior of the inmate, or special conditions existing at the institution at the time the interview is requested, or both, that the interview presents a serious risk of administrative or disciplinary problems." 161 U. S. App. D. C. 75, 87–88, 494 F. 2d 994, 1006–1007 (1974). Any blanket prohibition of such face-to-face interviews was held to abridge the First Amendment's protection of press freedom. Because of the important constitutional question involved, and because of an apparent conflict in approach to the question between the District of Columbia Circuit and the Ninth Circuit,[3] we granted certiorari. 415 U. S. 956 (1974).

The policies of the Federal Bureau of Prisons regarding visitations to prison inmates do not differ significantly from the California policies considered in *Pell* v. *Procunier, ante,* p. 817. As the Court of Appeals noted, "inmates' families, their attorneys, and religious counsel are accorded liberal visitation privileges. Even friends of inmates are allowed to visit, although their privileges appear to be somewhat more limited." 161 U. S. App. D. C., at 78, 494 F. 2d, at 997. Other than members of these limited groups with personal and professional ties to the inmates, members of the general public are not permitted under the Bureau's policy to enter the prisons and interview consenting inmates. This policy is applied with an even hand to all prospective visitors, including newsmen, who, like other members of the public, may enter the prisons to visit friends or family members. But, again like members of the general public, they may not enter

[3] See *Seattle-Tacoma Newspaper Guild* v. *Parker,* 480 F. 2d 1062, 1066–1067 (1973). See also *Hillery* v. *Procunier,* 364 F. Supp. 196, 199–200 (ND Cal. 1973).

the prison and insist on visiting an inmate with whom they have no such relationship. There is no indication on this record that Policy Statement 1220.1A has been interpreted or applied to prohibit a person, who is otherwise eligible to visit and interview an inmate, from doing so merely because he is a member of the press.[4]

Except for the limitation in Policy Statement 1220.1A on face-to-face press-inmate interviews, members of the press are accorded substantial access to the federal prisons in order to observe and report the conditions they find there. Indeed, journalists are given access to the prisons and to prison inmates that in significant respects exceeds that afforded to members of the general public. For example, Policy Statement 1220.1A permits press representatives to tour the prisons and to photograph any prison facilities.[5] During such tours a newsman is permitted to conduct brief interviews with any inmates he might encounter.[6] In addition, newsmen and inmates are permitted virtually unlimited written correspondence with each other.[7] Outgoing correspondence from inmates to press representatives is neither censored nor inspected. Incoming mail from press representatives is inspected only for contraband or statements inciting illegal action. Moreover, prison officials are available to the press and are required by Policy Statement 1220.1A to "give all possible assistance" to press representatives "in providing

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[4] The Solicitor General's brief represents that "[m]embers of the press, like the public generally, may visit the prison to see friends there." Presumably, the same is true with respect to family members. The respondents have not disputed this representation.

[5] Policy Statement 1220.1A ¶¶ 4b (5) and (7).

[6] See *id.*, ¶ 4b (6) set out in n. 1, *supra*. The newsman is requested not to reveal the identity of the inmate, and the conversation is to be limited to institutional facilities, programs, and activities.

[7] *Id.*, ¶¶ 4b (1) and (2).

background and a specific report" concerning any inmate complaints.[8]

The respondents have also conceded in their brief that Policy Statement 1220.1A "has been interpreted by the Bureau to permit a newsman to interview a randomly selected group of inmates." As a result, the reporter respondent in this case was permitted to interview a randomly selected group of inmates at the Lewisburg prison. Finally, in light of the constant turnover in the prison population, it is clear that there is always a large group of recently released prisoners who are available to both the press and the general public as a source of information about conditions in the federal prisons.[9]

Thus, it is clear that Policy Statement 1220.1A is not part of any attempt by the Federal Bureau of Prisons to conceal from the public the conditions prevailing in federal prisons. This limitation on prearranged press interviews with individually designated inmates was motivated by the same disciplinary and administrative considerations that underlie § 115.071 of the California Department of Corrections Manual, which we considered in *Pell* v. *Procunier* and *Procunier* v. *Hillery*, *ante*, p. 817. The experience of the Bureau accords with that of the California Department of Corrections and suggests that the interest of the press is often "concentrated on a relatively small number of inmates who, as a result, [become] virtual 'public figures' within the prison society and gai[n] a disproportionate degree of notoriety and influence among their fellow inmates." *Pell*, *ante*, at 831–832. As a result those inmates who are conspicuously publicized because of

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[8] *Id.*, ¶ 4b (12).

[9] The Solicitor General's brief informs us that "approximately one-half of the prison population on any one day will be released within the following 12 months. The average population is 23,000, of whom approximately 12,000 are released each year."

their repeated contacts with the press tend to become the source of substantial disciplinary problems that can engulf a large portion of the population at a prison.

The District Court and the Court of Appeals sought to meet this problem by decreeing a selective policy whereby prison officials could deny interviews likely to lead to disciplinary problems. In the expert judgment of the petitioners, however, such a selective policy would spawn serious discipline and morale problems of its own by engendering hostility and resentment among inmates who were refused interview privileges granted to their fellows. The Director of the Bureau testified that "one of the very basic tenets of sound correctional administration" is "to treat all inmates incarcerated in [the] institutions, as far as possible, equally." This expert and professional judgment is, of course, entitled to great deference.

In this case, however, it is unnecessary to engage in any delicate balancing of such penal considerations against the legitimate demands of the First Amendment. For it is apparent that the sole limitation imposed on newsgathering by Policy Statement 1220.1A is no more than a particularized application of the general rule that nobody may enter the prison and designate an inmate whom he would like to visit, unless the prospective visitor is a lawyer, clergyman, relative, or friend of that inmate. This limitation on visitations is justified by what the Court of Appeals acknowledged as "the truism that prisons are institutions where public access is generally limited." 161 U. S. App. D. C., at 80, 494 F. 2d, at 999. See *Adderley* v. *Florida,* 385 U. S. 39, 41 (1966). In this regard, the Bureau of Prisons visitation policy does not place the press in any less advantageous position than the public generally. Indeed, the total access to federal prisons and prison inmates that the Bureau of Prisons accords to the press far surpasses that available to other members of the public.

We find this case constitutionally indistinguishable from *Pell* v. *Procunier*, *ante*, p. 817, and thus fully controlled by the holding in that case. "[N]ewsmen have no constitutional right of access to prisons or their inmates beyond that afforded the general public." *Id.*, at 834. The proposition "that the Constitution imposes upon government the affirmative duty to make available to journalists sources of information not available to members of the public generally . . . finds no support in the words of the Constitution or in any decision of this Court." *Id.*, at 834–835. Thus, since Policy Statement 1220.1A "does not deny the press access to sources of information available to members of the general public," *id.*, at 835, we hold that it does not abridge the freedom that the First Amendment guarantees. Accordingly, the judgment of the Court of Appeals is reversed and the case is remanded to the District Court for further proceedings consistent with this opinion.

It is so ordered.

[For dissenting opinion of MR. JUSTICE DOUGLAS, see *ante*, p. 836.]

MR. JUSTICE POWELL, with whom MR. JUSTICE BRENNAN and MR. JUSTICE MARSHALL join, dissenting.

The Court today upholds the authority of the Bureau of Prisons to promulgate and enforce an absolute ban against personal interviews of prison inmates by representatives of the news media.[1] In my view the interview ban impermissibly burdens First Amendment freedoms. My analysis proceeds as follows. Part I addresses the nature and effect of the Bureau's policy.

[1] Throughout this opinion I use the terms "news media" and "press" to refer generally to both print and broadcast journalism. Of course, the use of television equipment in prisons presents special problems that are not before the Court in this case.

Part II concerns the constitutional underpinnings of respondents' attack on that policy. Part III considers the Bureau's justifications for an absolute interview ban in light of the appropriate standard of First Amendment review, and Part IV surveys some of the factors that the Bureau may consider in formulating a constitutionally acceptable interview policy. Part V contains some concluding remarks.

I

The ban against press interviews is not part of any general news blackout in the federal prisons. Bureau of Prisons Policy Statement 1220.1A establishes the official policy regarding prisoner-press communications, and that policy in many respects commendably facilitates public dissemination of information about federal penal institutions. Inmate letters addressed to members of the news media are neither opened nor censored, and incoming mail from press representatives is inspected only for contraband and for content likely to incite illegal conduct. Furthermore, the Bureau officially encourages newsmen to visit federal prisons in order to report on correctional facilities and programs.

The specific issue in this case is the constitutionality of the Bureau's ban against prisoner-press interviews. That policy is set forth in ¶ 4b (6) of the Policy Statement:

> "Press representatives will not be permitted to interview individual inmates. This rule shall apply even where the inmate requests or seeks an interview. However, a conversation may be permitted with inmates whose identity is not to be made public, if it is limited to the discussion of institutional facilities, programs and activities."

The Policy Statement does not explicate the distinction between an "interview" and a "conversation," but that subject was explored in evidentiary proceedings before the

District Court. The court found that a "conversation" generally occurs when a newsman is taking a supervised tour of an institution and stops to ask an inmate about prison conditions and the like. It is a brief, spontaneous discussion with a randomly encountered inmate on subjects limited to "institutional facilities, programs, and activities." An "interview," by contrast, is a prearranged private meeting with a specifically designated inmate. It is unrestricted as to subject matter and lasts a sufficient time to permit full discussion.[2]

The Bureau's prohibition against press interviews is absolute in nature. It applies without regard to the record and characteristics of the particular inmate involved, the purpose of the interview, or the conditions then prevailing at the institution in question. At the time of the decisions of the District Court and the Court of Appeals, the interview ban applied with equal rigor to every correctional facility administered by the Bureau, community treatment centers as well as major penitentiaries. By letter dated April 16, 1974, the Solicitor General informed us that the Bureau subsequently modified its policy to exempt minimum security facilities from the absolute prohibition of press interviews. This change affects approximately one-quarter of the inmate population of the federal prisons. For the remainder, the Bureau intends to continue its established policy.

In its order remanding the case for reconsideration in light of *Branzburg* v. *Hayes*, 408 U. S. 665 (1972), the Court of Appeals directed the District Court to determine

[2] In at least two instances, federal wardens have permitted newsmen to interview randomly selected groups of inmates. Apparently, such occurrences are not widespread, and the basis for them is unclear. Neither in express terms nor by implication does the Policy Statement authorize such group interviews, and the Government does not suggest that the Bureau of Prisons officially approves the practice.

the "extent to which the accurate and effective reporting of news has a critical dependence upon the opportunity for private personal interviews." 155 U. S. App. D. C. 283, 284, 477 F. 2d 1168, 1169 (1972). The District Court held an evidentiary hearing on this subject and made specific findings of fact. 357 F. Supp. 779 (DC 1972). Thanks to this special effort by the Court of Appeals and the District Court, we have an unusually detailed and informative account of the effect of the interview ban on prisoner-press communications.[3]

The District Court received testimony on this point from six knowledgeable persons.[4] All agreed that personal interviews are crucial to effective reporting in the prison context. A newsman depends on interviews in much the same way that a trial attorney relies on cross-

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[3] Writing for the Court of Appeals, Judge McGowan attributed this special care to develop an unusually enlightening evidentiary record to the "great respect which the federal judiciary entertains for the Bureau by reason of its long and continuous history of distinguished and enlightened leadership . . . ." 161 U. S. App. D. C. 75, 77, 494 F. 2d 994, 996. This is a sentiment which I fully share, for the Bureau has long been a constructive leader in prison reform.

[4] The court received testimony from three experienced reporters, two academic journalists, and an attorney with special expertise in this area. The reporters were respondent Ben H. Bagdikian, a Washington Post reporter experienced in covering prisons and interviewing inmates; Timothy Leland, a Pulitzer prize winner who is Assistant Managing Editor of the Boston Globe and head of its investigative reporting team; and John W. Machacek, a reporter for the Rochester Times-Union, who won a Pulitzer prize for his coverage of the Attica Prison riot. The academic journalists were Elie Abel, Dean of the Graduate School of Journalism of Columbia University, and Roy M. Fisher, Dean of the School of Journalism of the University of Missouri and former editor of the Chicago Daily News. The sixth witness was Arthur L. Liman, an attorney who served as general counsel to the New York State Special Commission on Attica. In that capacity he supervised an investigation involving 1,600 inmate interviews, at least 75 of which he conducted personally.

examination. Only in face-to-face discussion can a reporter put a question to an inmate and respond to his answer with an immediate follow-up question. Only in an interview can the reporter pursue a particular line of inquiry to a satisfactory resolution or confront an inmate with discrepancies or apparent inconsistencies in his story. Without a personal interview a reporter is often at a loss to determine the honesty of his informant or the accuracy of the information received.[5] This is particularly true in the prison environment, where the sources of information are unlikely to be well known to newsmen or to have established any independent basis for assessing credibility. Consequently, ethical newsmen are reluctant to publish a story without an opportunity through face-to-face discussion to evaluate the veracity and reliability of its source. Those who do publish without interviews are likely to print inaccurate, incomplete, and sometimes jaundiced news items. The detailed testimony on this point led the District Court to find as a fact that the absolute interview ban precludes accurate and effective reporting on prison conditions and inmate grievances.

The District Court also found that the alternative avenues of prisoner-press communication allowed by the Policy Statement, whether considered singly or in aggregation, are insufficient to compensate for the prohibition of personal interviews. For the reasons stated above, correspondence is decidedly inferior to face-to-face discussion as a means of obtaining reliable information about prison conditions and inmate grievances. In addition, the prevalence of functional illiteracy among the inmate population poses a serious difficulty; many prison-

[5] Both Dean Abel and Dean Fisher testified that the personal interview is so indispensable to effective reporting that the development of interviewing techniques occupies a central place in the curricula of professional journalism schools.

ers are simply incapable of communicating effectively in writing.

Random conversations during supervised tours of prison facilities are also no substitute for personal interviews with designated inmates. The conversations allowed by the Policy Statement are restricted in both duration and permissible subject matter. Furthermore, not every inmate is equally qualified to speak on every subject. If a reporter is investigating a particular incident, the opportunity to converse with inmates who were not present is of little consequence. Moreover, the conversations associated with guided tours are often held in the presence of several inmates, a factor likely to result in distortion of the information obtained.[6] The District Court received

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[6] In recounting his experience as general counsel to the New York State Special Commission on Attica, Arthur L. Liman gave the following testimony:

"We found that in the group interviews the inmates tended to give us rhetoric, rather than facts; and that . . . in the interest of showing solidarity, inmates were making speeches to us rather than confiding what I knew in many cases to be the fact.

"I should add that the basic problem in conducting interviews at a prison is that it is a society in which inmates face sanctions and rewards not just from the administration but from other inmates; and that when an inmate sees you in private, he will tell you things about the administration that may not only be unfavorable but may in many cases be favorable. I found that when we saw them in group, there was a tendency to say nothing favorable about the administration and instead simply to make a speech about how horrible conditions were. In fact, many of the inmates who would say this in group would say something different when they were seen alone." 1 App. 290–291.

"There is something which is not stressed in our description of conditions because we found it not to be a major factor at Attica, and that is the question or the issue of physical brutality toward inmates. The press, before this investigation, had played that up as the major grievance at Attica. We found, when we talked to inmates privately, that the incidence of physical confrontation between offi-

detailed testimony concerning the kinds of information that can only be obtained through personal interviews of individual inmates.

On the basis of this and other evidence, the District Court found that personal interviews are essential to accurate and effective reporting in the prison environment. The Court of Appeals endorsed that conclusion, noting that the trial court's findings of fact on this issue "are supported by a substantial body of evidence of record, and indeed appear to be uncontradicted." 161 U. S. App. D. C., at 82, 494 F. 2d, at 1001. The Government does not seriously attack this conclusion. Instead, it contends that the effect of the Bureau's interview ban on prisoner-press communications raises no claim of constitutional dimensions. It is to that question that I now turn.

II

Respondents assert a constitutional right to gather news. In the language of the Court of Appeals, they claim a right of access by the press to newsworthy events. However characterized, the gist of the argument is that the constitutional guarantee of a free press may be rendered ineffective by excessive restraints on access to information and therefore that the Government may not enforce such restrictions absent some substantial justification for doing so. In other words, respondents contend that the First Amendment protects both the dissemination of news and the antecedent activity of obtaining the information that becomes news.

The Court rejects this claim on the ground that "newsmen have no constitutional right of access to prisons or

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cers and inmates was rather limited, and that the real grievance was not about those incidents, but rather about what they would feel was a form of psychic repression, depriving people of their manhood. Therefore, I think a lot of the myth about physical beatings was dispelled." *Id.*, at 292.

their inmates beyond that afforded the general public." *Pell* v. *Procunier, ante,* at 834. It is said that First Amendment protections for newsgathering by the press reach only so far as the opportunities available for the ordinary citizen to have access to the source of news. Because the Bureau of Prisons does not specifically discriminate against the news media, its absolute prohibition of prisoner-press interviews is not susceptible to constitutional attack. In the Court's view, this is true despite the factual showing that the interview ban precludes effective reporting on prison conditions and inmate grievances. From all that appears in the Court's opinion, one would think that any governmental restriction on access to information, no matter how severe, would be constitutionally acceptable to the majority so long as it does not single out the media for special disabilities not applicable to the public at large.

I agree, of course, that neither any news organization nor reporters as individuals have constitutional rights superior to those enjoyed by ordinary citizens. The guarantees of the First Amendment broadly secure the rights of every citizen; they do not create special privileges for particular groups or individuals. For me, at least, it is clear that persons who become journalists acquire thereby no special immunity from governmental regulation. To this extent I agree with the majority. But I cannot follow the Court in concluding that *any* governmental restriction on press access to information, so long as it is nondiscriminatory, falls outside the purview of First Amendment concern.

The Court principally relies on two precedents. In *Zemel* v. *Rusk,* 381 U. S. 1 (1965), the Court rejected a United States citizen's contention that he had a First Amendment right to visit Cuba in order to inform himself of the conditions there. The more recent authority is *Branzburg* v. *Hayes,* 408 U. S. 665 (1972), where we

considered the assertion by newsmen of a qualified First Amendment right to refuse to reveal their confidential sources or the information obtained from them to grand juries. The Court rejected this claim, primarily on the ground that the largely speculative public interest "in possible future news about crime from undisclosed, unverified sources" could not override the competing interest "in pursuing and prosecuting those crimes reported to the press by informants and in thus deterring the commission of such crimes in the future." *Id.*, at 695.

Relying on these precedents, the majority apparently concludes that nondiscriminatory restrictions on press access to information are constitutionally irrelevant. Neither *Zemel* nor *Branzburg* warrants so broad a reading. In *Zemel* the Court rejected the asserted First Amendment right to visit Cuba on the ground that the governmental restriction on trips to that country was "an inhibition of action" rather than a restraint of speech. 381 U. S., at 16. However appropriate to the context of that case, this distinction could not have been intended as an all-embracing test for determining which governmental regulations implicate First Amendment freedoms and which do not. The decision in *United States* v. *O'Brien*, 391 U. S. 367 (1968), is sufficient answer to any such suggestion. Moreover, the dichotomy between speech and action, while often helpful to analysis, is too uncertain to serve as the dispositive factor in charting the outer boundaries of First Amendment concerns. In the instant case, for example, it may be said with equal facility that the Bureau forbids the *conduct*, at least by newsmen and the public generally, of holding a private meeting with an incarcerated individual or, alternatively, that the Bureau prohibits the direct exchange of *speech* that constitutes an interview with a press representative. In light of the Bureau's willingness to allow lawyers, clergymen, relatives, and friends to meet privately with

designated inmates, the latter characterization of the interview ban seems closer to the mark, but in my view the scope and meaning of First Amendment guarantees do not hinge on these semantic distinctions. The reality of the situation is the same, certainly in this case, and there is no magic in choosing one characterization rather than the other. Simply stated, the distinction that formed the basis for decision in *Zemel* is not helpful here.

Nor does *Branzburg* v. *Hayes, supra,* compel the majority's resolution of this case. It is true, of course, that the *Branzburg* decision rejected an argument grounded in the assertion of a First Amendment right to gather news and that the opinion contains language which, when read in isolation, may be read to support the majority's view. *E. g.,* 408 U. S., at 684–685. Taken in its entirety, however, *Branzburg* does not endorse so sweeping a rejection of First Amendment challenges to restraints on access to news. The Court did not hold that the government is wholly free to restrict press access to newsworthy information. To the contrary, we recognized explicitly that the constitutional guarantee of freedom of the press does extend to some of the antecedent activities that make the right to publish meaningful: "Nor is it suggested that news gathering does not qualify for First Amendment protection; without some protection for seeking out the news, freedom of the press could be eviscerated." *Id.,* at 681. We later reiterated this point by noting that "news gathering is not without its First Amendment protections . . . ." *Id.*, at 707. And I emphasized the limited nature of the *Branzburg* holding in my concurring opinion: "The Court does not hold that newsmen, subpoenaed to testify before a grand jury, are without constitutional rights with respect to the gathering of news or in safeguarding their sources." *Id.*, at 709. In addition to these explicit statements, a fair reading of the majority's analysis in *Branzburg* makes plain that the result hinged

on an assessment of the competing societal interests involved in that case rather than on any determination that First Amendment freedoms were not implicated. See especially *id.*, at 700–701.

In sum, neither *Zemel* nor *Branzburg* presents a barrier to independent consideration of respondents' constitutional attack on the interview ban. Those precedents arose in contexts far removed from that of the instant case, and in my view neither controls here. To the extent that *Zemel* and *Branzburg* speak to the issue before us, they reflect no more than a sensible disinclination to follow the right-to-access argument as far as dry logic might extend. As the Court observed in *Zemel:* "There are few restrictions on action which could not be clothed by ingenious argument in the garb of decreased data flow." 381 U. S., at 16–17. It goes too far to suggest that the government must justify under the stringent standards of First Amendment review every regulation that might affect in some tangential way the availability of information to the news media. But to my mind it is equally impermissible to conclude that no governmental inhibition of press access to newsworthy information warrants constitutional scrutiny. At some point official restraints on access to news sources, even though not directed solely at the press, may so undermine the function of the First Amendment that it is both appropriate and necessary to require the government to justify such regulations in terms more compelling than discretionary authority and administrative convenience. It is worth repeating our admonition in *Branzburg* that "without some protection for seeking out the news, freedom of the press could be eviscerated." 408 U. S., at 681.

The specific issue here is whether the Bureau's prohibition of prisoner-press interviews gives rise to a claim of constitutional dimensions. The interview ban is categorical in nature. Its consequence is to preclude accurate

and effective reporting on prison conditions and inmate grievances. These subjects are not privileged or confidential. The Government has no legitimate interest in preventing newsmen from obtaining the information that they may learn through personal interviews or from reporting their findings to the public. Quite to the contrary, federal prisons are public institutions. The administration of these institutions, the effectiveness of their rehabilitative programs, the conditions of confinement that they maintain, and the experiences of the individuals incarcerated therein are all matters of legitimate societal interest and concern.[7] Respondents do not assert a right to force disclosure of confidential information or to invade in any way the decisionmaking processes of governmental officials. Neither do they seek to question any inmate who does not wish to be interviewed. They only seek to be free of an exceptionless prohibition against a method of newsgathering that is essential to effective reporting in the prison context.

I believe that this sweeping prohibition of prisoner-press interviews substantially impairs a core value of the First Amendment. Some years ago, Professor Chafee

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[7] The history of our prisons is in large measure a chronicle of public indifference and neglect. THE CHIEF JUSTICE, who has provided enlightening leadership on the subject, has spoken out frequently against the ignorance and apathy that characterizes our Nation's approach to the problems of our prisons:

"Yet in spite of all this development of the step-by-step details in the criminal adversary process, we continue, at the termination of that process, to brush under the rug the problems of those who are found guilty and subject to criminal sentence. In a very immature way, we seem to want to remove the problem from public consciousness.

"It is a melancholy truth that it has taken the tragic prison outbreaks of the past three years to focus widespread public attention on this problem." Burger, Our Options Are Limited, 18 Vill. L. Rev. 165, 167 (1972). See W. Burger, For Whom the Bell Tolls, reprinted at 25 Record of N. Y. C. B. A. (Supp.) 14, 18, 23–24 (1970).

pointed out that the guarantee of freedom of speech and press protects two kinds of interests: "There is an individual interest, the need of many men to express their opinions on matters vital to them if life is to be worth living, and a social interest in the attainment of truth, so that the country may not only adopt the wisest course of action but carry it out in the wisest way." Z. Chafee, Free Speech in the United States 33 (1954). In its usual application—as a bar to governmental restraints on speech or publication—the First Amendment protects important values of individual expression and personal self-fulfillment. But where as here, the Government imposes neither a penalty on speech nor any sanction against publication, these individualistic values of the First Amendment are not directly implicated.

What is at stake here is the societal function of the First Amendment in preserving free public discussion of governmental affairs. No aspect of that constitutional guarantee is more rightly treasured than its protection of the ability of our people through free and open debate to consider and resolve their own destiny. As the Solicitor General made the point, "[t]he First Amendment is one of the vital bulwarks of our national commitment to intelligent self-government." Brief for Petitioners 47–48. It embodies our Nation's commitment to popular self-determination and our abiding faith that the surest course for developing sound national policy lies in a free exchange of views on public issues.[8] And public debate must not

[8] Indeed, Professor Meiklejohn identified this aspect of the First Amendment as its paramount value:

"Just so far as, at any point, the citizens who are to decide an issue are denied acquaintance with information or opinion or doubt or disbelief or criticism which is relevant to that issue, just so far the result must be ill-considered, ill-balanced planning for the general good. *It is that mutilation of the thinking process of the community against which the First Amendment to the Constitution is di-*

only be unfettered; it must also be informed. For that reason this Court has repeatedly stated that First Amendment concerns encompass the receipt of information and ideas as well as the right of free expression. *Kleindienst* v. *Mandel*, 408 U. S. 753, 762 (1972); *Red Lion Broadcasting Co.* v. *FCC*, 395 U. S. 367, 390 (1969); *Lamont* v. *Postmaster General*, 381 U. S. 301 (1965); *Martin* v. *City of Struthers*, 319 U. S. 141, 143 (1943).

In my view this reasoning also underlies our recognition in *Branzburg* that "news gathering is not without its First Amendment protections . . . ." 408 U. S., at 707. An informed public depends on accurate and effective reporting by the news media. No individual can obtain for himself the information needed for the intelligent discharge of his political responsibilities. For most citizens the prospect of personal familiarity with newsworthy events is hopelessly unrealistic. In seeking out the news the press therefore acts as an agent of the public at large. It is the means by which the people receive that free flow of information and ideas essential to intelligent self-government. By enabling the public to assert meaningful control over the political process, the press performs a crucial function in effecting the societal purpose of the First Amendment. That function is recognized by specific reference to the press in the text of the Amendment and by the precedents of this Court:

> "The Constitution specifically selected the press . . . to play an important role in the discussion of public affairs. Thus the press serves and was designed to serve as a powerful antidote to any abuses of power by governmental officials and as a constitutionally chosen means for keeping officials elected by the

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rected. The principle of the freedom of speech springs from the necessities of the program of self-government." A. Meiklejohn, Free Speech 26 (1948) (emphasis in original).

people responsible to all the people whom they were selected to serve." *Mills* v. *Alabama*, 384 U. S. 214, 219 (1966).

This constitutionally established role of the news media is directly implicated here. For good reasons, unrestrained public access is not permitted. The people must therefore depend on the press for information concerning public institutions. The Bureau's absolute prohibition of prisoner-press interviews negates the ability of the press to discharge that function and thereby substantially impairs the right of the people to a free flow of information and ideas on the conduct of their Government. The underlying right is the right of the public generally. The press is the necessary representative of the public's interest in this context and the instrumentality which effects the public's right. I therefore conclude that the Bureau's ban against personal interviews must be put to the test of First Amendment review.

III

Because I believe that the ban against prisoner-press interviews significantly impinges on First Amendment freedoms, I must consider whether the Government has met its heavy burden of justification for that policy. In *Tinker* v. *Des Moines School District*, 393 U. S. 503 (1969), the Court noted that First Amendment guarantees must be "applied in light of the special characteristics of the . . . environment." *Id.*, at 506. Earlier this Term we had occasion to consider the applicability of those guarantees in light of the special characteristics of the prison environment. That opportunity arose in *Procunier* v. *Martinez*, 416 U. S. 396 (1974), where we considered the constitutionality of California prison regulations authorizing censorship of inmate correspondence. We declined to analyze that case in terms of "prisoners'

rights," for we concluded that censorship of prisoner mail, whether incoming or outgoing, impinges on the interest in communication of both the inmate and the nonprisoner correspondent: "Whatever the status of a prisoner's claim to uncensored correspondence with an outsider, it is plain that the latter's interest is grounded in the First Amendment's guarantee of freedom of speech." *Id.*, at 408. We therefore looked for guidance "not to cases involving questions of 'prisoners' rights,' but to decisions of this Court dealing with the general problem of incidental restrictions on First Amendment liberties imposed in furtherance of legitimate governmental activities." *Id.*, at 409. Adopting the approach followed in *Tinker, supra; Healy* v. *James,* 408 U. S. 169 (1972); and *United States* v. *O'Brien,* 391 U. S. 367 (1968), we enunciated the following standard for determining the constitutionality of prison regulations that limit the First Amendment liberties of nonprisoners:

> "First, the regulation or practice in question must further an important or substantial governmental interest unrelated to the suppression of expression. . . . Second, the limitation of First Amendment freedoms must be no greater than is necessary or essential to the protection of the particular governmental interest involved." 416 U. S., at 413.

We announced *Procunier* v. *Martinez, supra,* after final decision of this case by the District Court and affirmance by the Court of Appeals. Happily, those courts anticipated our holding in *Procunier* and decided this case under a standard of First Amendment review that is in substance identical to our formulation there. Thus, the Court of Appeals sought to assure that the impairment of the public's right to a free flow of information about prisons is "no greater than is necessary for the protection of the legitimate societal interests in the effective admin-

istration of [penal] systems." 161 U. S. App. D. C., at 80, 494 F. 2d, at 999.[9] The court reviewed in detail the various interests asserted by the Bureau and reached the following conclusion:

> "[W]hile we do not question that the concerns voiced by the Bureau are legitimate interests that merit protection, we must agree with the District Court that they do not, individually or in total, justify the sweeping absolute ban that the Bureau has chosen to impose. When regulating an area in which First Amendment interests are involved, administrative officials must be careful not only to assure that they are responding to legitimate interests which are within their powers to protect; they must also take care not to cast regulations in a broad manner that unnecessarily sacrifices First Amendment rights. In this case the scope of the interview ban is excessive; the Bureau's interests can and must be protected on a more selective basis." *Id.*, at 86, 494 F. 2d, at 1005.

I agree with this conclusion by the Court of Appeals. The Bureau's principal justification for its interview ban has become known during the course of this litigation as the "big wheel" phenomenon. The phrase refers generally to inmate leaders. The Bureau argues that press interviews with "big wheels" increase their status and influence and thus enhance their ability to persuade other prisoners to engage in disruptive behavior. As a result security is threatened, discipline impaired, and meaningful rehabilitation rendered more problematical than ever.

There seems to be little question that "big wheels" do

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[9] The District Court framed this standard in question form: "In short, are the limitations placed on First Amendment freedoms no greater than is necessary to protect the governmental interests asserted?" 357 F. Supp. 770, 773.

exist [10] and that their capacity to influence their fellow inmates may have a negative impact on the correctional environment of penal institutions. Whether press inter-

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[10] The following excerpt from the examination of Hans W. Mattick, Professor of Criminal Justice and Director of the Center for Research in Criminal Justice at the University of Illinois, explains the bases for inmate leadership:

"Q What are the particular talents or factors that would lead inmates to look upon particular persons among them as leaders?

"A Well, it would depend in part on the native talents of the person, whether he was reasonably articulate, whether he has reasonable social skills. But that wouldn't be sufficient.

"He would also have to have some significant position in the prison, whether that would be the clerk of a cellhouse or whether that would be the assistant to a shop foreman or whether he would be a person who was a porter or a runner, which looks like a low status position to outsiders, but which position has great mobility and therefore you can become a message sender and a message carrier, or persons who work in areas that give them access to goods in what is essentially a scarcity economy.

"So people who work in the kitchens or bakery or where other scarce supplies are and therefore can distribute them illegitimately or serve other purposes of that kind, they tend to have leadership.

"Q Does the fact that an inmate is well known outside of prison tend to make him a leader within a prison among the inmates within the prison?

"A It depends a great deal on the circumstances; that is, for instance, notoriety by itself can't bestow leadership.

"For instance, Sirhan Sirhan, for example, or Richard Speck are simply notorious and that doesn't bestow leadership qualities on them. Or someone like Al Capone, for example, may have had great status outside of the prison, but when he was in prison, he became the object of revenge and attacks by persons who wanted to settle old scores, because it was felt that he couldn't implement enough power to retaliate in turn.

"On the other hand, there were persons, confidence men or spectacular burglars or armed robbers with big scores or something of that kind, where their reputation precedes them and follows them into prison, and that then is combined, and also with certain talents and social skill and articulateness, and if it also looks as though they

views play a significant role in the creation of "big wheels" or in the enhancement of their prestige was a subject of dispute in the District Court. With appropriate regard for the expertise of prison administrators, that court found that the problems associated with the "big wheel" phenomenon "are all real considerations and while somewhat impressionistic, they are supported by experience and advanced in good faith." 357 F. Supp. 770, 774.

The District Court also found, however, that the "big wheel" theory does not justify the Bureau's categorical prohibition of all press interviews, and the Court of Appeals endorsed this conclusion. The rationale applies only to those individuals with both disruptive proclivities and leadership potential. The record reveals estimates of the number of prison troublemakers ranging from five to ten percent. Logically, the number of prisoners in this category who have significant influence in the inmate community should constitute a substantially smaller percentage. To the extent that the "big wheel" phenomenon includes influential inmates who generally cooperate in maintaining institutional order, it is not a problem at all. Publicity which enhances *their* prestige is certainly no hindrance to effective penal administration. Moreover, the Bureau has not shown that it is unable to identify disruptive "big wheels" and to take precautions specifically designed to prevent the adverse effects of media attention to such inmates. In short, the remedy of no interview of any inmate is broader than is necessary to avoid the concededly real problems of the "big wheel" phenomenon.[11]

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have a future in the free community, either in the illegitimate world or the legitimate world, that can play a part in the phenomenon that we call leadership." 2 App. 580–581.

[11] The other considerations advanced by the Bureau do not justify an absolute interview ban but only indicate the difficulties of case-

This conclusion is supported by detailed evidence and by the successful experience of other prison systems in allowing prisoner-press interviews. In connection with this litigation, counsel for respondents attempted to ascertain the interview policies followed by prison administrators in every State and in numerous local jurisdictions. The District Court received into evidence only those policy statements that had been adopted in written form. Of the 24 American jurisdictions in this sample, only five broadly prohibit personal interviews of prison inmates by media representatives.[12] Seven jurisdictions vest in correctional officials the authority to allow or deny such interviews on a case-by-case basis,[13] and 11 generally permit prisoner-press interviews.[14] Thus, correctional authorities in a substantial majority of the prison systems represented have found no need to adopt an exceptionless prohibition against all press interviews of consenting inmates, and a significant number of jurisdictions more or less freely permit them. The District Court received detailed evidence concerning these prison systems and the success of the open-interview policy[15] and found no substantial reason to suppose that the Bureau of Prisons faces difficulties more severe than those encountered in the jurisdictions that generally allow press interviews. This

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by-case evaluation of interview requests. These arguments are addressed in Part IV.

[12] These five jurisdictions are California, Connecticut, Kentucky, Virginia, and Wisconsin.

[13] This approach is followed in Alaska, Georgia, Montana, New Jersey, Oregon, Pennsylvania, and South Carolina.

[14] The jurisdictions that generally permit personal interviews are Illinois, Maine, Maryland, Massachusetts, Nebraska, North Carolina, Ohio, Vermont, Iowa, New York City, and the District of Columbia. Additionally, one jurisdiction, New Mexico, follows a unique policy that defies categorization.

[15] The Court received such evidence from penal administrators in Illinois, Massachusetts, New York City, and the District of Columbia.

survey of prevailing practices reinforces the conclusion that the Bureau's prohibition of all prisoner-press interviews is not necessary to the protection of the legitimate governmental interests at stake.

IV

Finding no necessity for an absolute interview ban, the District Court proceeded to require that interview requests be evaluated on a case-by-case basis and that they be refused only when the conduct of an individual inmate or the conditions prevailing at a particular institution warrant such action. The Court of Appeals affirmed the substance of the order: [16]

> "[W]e . . . require that interviews be denied only where it is the judgment of the administrator directly concerned, based on either the demonstrated behavior of the inmate, or special conditions existing at the

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[16] The District Court ordered that the Bureau draft regulations generally permitting press interviews and that exceptions to that policy "be precisely drawn to prohibit an interview only where it can be established as a matter of probability on the basis of actual experience that serious administrative or disciplinary problems are, in the judgment of the prison administrators directly concerned, likely to be directly and immediately caused by the interview because of either the demonstrated behavior of the inmate concerned or special conditions existing at the inmate's institution at the particular time the interview is requested." 357 F. Supp. 779, 784. The Government interpreted this order to require that every denial of an interview request be supported by objective evidence, and argued that such a requirement would invade the proper exercise of discretion by prison administrators and undercut their authority to respond to perceived threats to institutional security and order. Apparently responding to these concerns, the Court of Appeals deleted the references to "likelihood" and "probability" and recast the relevant portion of the order in the language quoted in the text. The thrust of the order remains, however, that prison administrators must decide on an *ad hoc* basis whether to grant each particular request for an interview.

institution at the time the interview is requested, or both, that the interview presents a serious risk of administrative or disciplinary problems." 161 U. S. App. D. C., at 87–88, 494 F. 2d, at 1006–1007.

The Bureau objects to the requirement of individual evaluation of interview requests. It argues that this approach would undermine inmate morale and discipline and occasion severe administrative difficulties. The line between a good-faith denial of an interview for legitimate reasons and a self-interested determination to avoid unfavorable publicity could prove perilously thin. Not unnaturally, prison administrators might tend to allow interviews with cooperative inmates and restrict press access to known critics of institutional policy and management. Denials that were in fact based on an administrator's honest perception of the risk to order and security might be interpreted by some inmates as evidence of bias and discrimination. Additionally, a policy requiring case-by-case evaluation of interview requests could subject the Bureau to widespread litigation of an especially debilitating nature. Unable to rely on a correct application of a general rule or policy authorizing denial, prison officials would be forced to an *ad hoc* defense of the merits of each decision before reviewing courts. In short, the Bureau argues that an individualized approach to press interviews is correctionally unsound and administratively burdensome.

This assessment of the difficulties associated with case-by-case evaluation of interview requests may seem overly pessimistic, but it is not without merit. In any event, this is the considered professional opinion of the responsible administrative authorities. They are entitled to make this judgment, and the courts are bound to respect their decision unless the Constitution commands otherwise. While I agree with the District Court and

the Court of Appeals that the First Amendment requires the Bureau to abandon its absolute ban against press interviews, I do not believe that it compels the adoption of a policy of *ad hoc* balancing of the competing interests involved in each request for an interview.

This conclusion follows from my analysis in Part II, *supra*, of the nature of the constitutional right at issue in this case. The absolute interview ban precludes accurate and effective reporting on prison conditions and inmate grievances and thereby substantially negates the ability of the news media to inform the public on those subjects. Because the interview ban significantly impairs the constitutional interest of the people in a free flow of information and ideas on the conduct of their Government, it is appropriate that the Bureau be put to a heavy burden of justification for that policy. But it does not follow that the Bureau is under the same heavy burden to justify any measure of control over press access to prison inmates. Governmental regulation that has no palpable impact on the underlying right of the public to the information needed to assert ultimate control over the political process is not subject to scrutiny under the First Amendment. Common sense and proper respect for the constitutional commitment of the affairs of state to the Legislative and Executive Branches should deter the Judiciary from chasing the right-of-access rainbows that an advocate's eye can spot in virtually all governmental actions. Governmental regulations should not be policed in the name of a "right to know" unless they significantly affect the societal function of the First Amendment. I therefore believe that a press interview policy that substantially accommodates the public's legitimate interest in a free flow of information and ideas about federal prisons should survive constitutional review. The balance should be struck between the absolute ban of the Bureau and an uninhibited license to interview at will.

Thus, the Bureau could meet its obligation under the First Amendment and protect its legitimate concern for effective penal administration by rules drawn to serve both purposes without undertaking to make an individual evaluation of every interview request. Certainly the Bureau may enforce reasonable time, place, and manner restrictions for press interviews. Such regulations already govern interviews of inmates by attorneys, clergymen, relatives, and friends. Their application to newsmen would present no great problems. To avoid media creation of "big wheels," the Bureau may limit the number of interviews of any given inmate within a specified time period. To minimize the adverse consequences of publicity concerning existing "big wheels," the Bureau may refuse to allow any interviews of a prisoner under temporary disciplinary sanction such as solitary confinement. And, of course, prison administrators should be empowered to suspend all press interviews during periods of institutional emergency. Such regulations would enable the Bureau to safeguard its legitimate interests without incurring the risks associated with administration of a wholly *ad hoc* interview policy.

A similar approach would allay another of the Bureau's principal concerns—the difficulty of determining who constitutes the press. The Bureau correctly points out that "the press" is a vague concept. Any individual who asserts an intention to convey information to others might plausibly claim to perform the function of the news media and insist that he receive the same access to prison inmates made available to accredited reporters. The Bureau is understandably reluctant to assume the responsibility for deciding such questions on a case-by-case basis. Yet the Bureau already grants special mail privileges to members of the news media, and for that purpose it defines the press as follows: "A newspaper entitled to sec-

ond class mailing privileges; a magazine or periodical of general distribution; a national or international news service; a radio or television network or station." Policy Statement 1220.1A, ¶ 4a. This regulation or one less inclusive could serve as an adequate basis for formulating a constitutionally acceptable interview policy. Allowing personal interviews of prison inmates by representatives of the news media, as so defined, would afford substantial opportunity for the public to be informed on the conduct of federal prisons. The fact that some individuals who may desire interviews will not fall within a broad and otherwise reasonable definition of the press should not present any constitutional difficulty.[17]

These comments are not intended to be exhaustive or to dictate correctional policy but only to indicate the broad contours of the approach that I think should be available to the Bureau. I would affirm that portion of the judgment of the District Court as affirmed by the Court of Appeals that invalidates the absolute ban against prisoner-press interviews, but remand the case with instructions to allow the Bureau to devise a new policy in accordance with its own needs and with the guidelines set forth in this opinion.

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[17] The experience of prison systems that have generally allowed press interviews does not suggest that the Bureau would be flooded with interview requests. If, however, the number of requests were excessive, prison administrators would have to devise some scheme for allocating interviews among media representatives. I have assumed throughout this discussion that priority of request would control, but I do not mean to foreclose other possibilities. It is a fairly common practice for media representatives to form pools that allow many newsmen to participate, either in person or by proxy, in a news event for which press access is limited. The Bureau could certainly cooperate with the news media in the administration of such a program without favoritism or exclusivity to ensure widespread and dependable dissemination of information about our prisons.

V

The Court's resolution of this case has the virtue of simplicity. Because the Bureau's interview ban does not restrict speech or prohibit publication or impose on the press any special disability, it is not susceptible to constitutional attack. This analysis delineates the outer boundaries of First Amendment concerns with unambiguous clarity. It obviates any need to enter the thicket of a particular factual context in order to determine the effect on First Amendment values of a nondiscriminatory restraint on press access to information. As attractive as this approach may appear, I cannot join it. I believe that we must look behind bright-line generalities, however sound they may seem in the abstract, and seek the meaning of First Amendment guarantees in light of the underlying realities of a particular environment. Indeed, if we are to preserve First Amendment values amid the complexities of a changing society, we can do no less.

Reporter's Note

The next page is purposely numbered 901. The numbers between 875 and 901 were intentionally omitted, in order to make it possible to publish the orders in the current preliminary print of the United States Reports with *permanent* page numbers, thus making the official citations immediately available.

ORDERS FROM MAY 28 THROUGH JUNE 17, 1974

MAY 28, 1974

Affirmed on Appeal

No. 73–777. OTTER TAIL POWER CO. *v.* UNITED STATES. Affirmed on appeal from D. C. Minn. MR. JUSTICE BLACKMUN and MR. JUSTICE POWELL took no part in the consideration or decision of this case. Reported below: 360 F. Supp. 451.

No. 73–1349. FLORIDA EAST COAST RAILWAY CO. ET AL. *v.* UNITED STATES ET AL. Affirmed on appeal from D. C. M. D. Fla. MR. JUSTICE POWELL took no part in the consideration or decision of this case. Reported below: 368 F. Supp. 1009.

No. 73–1391. SPIELMAN-FOND, INC., ET AL. *v.* HANSON'S, INC., ET AL. Affirmed on appeal from D. C. Ariz. Reported below: 379 F. Supp. 997.

No. 73–6446. AUGUST *v.* BRONSTEIN, CHAIRMAN, CIVIL SERVICE COMMISSION OF THE CITY OF NEW YORK, ET AL. Affirmed on appeal from D. C. S. D. N. Y. Reported below: 369 F. Supp. 190.

No. 73–1491. HAINES *v.* ASKEW, GOVERNOR OF FLORIDA, ET AL. Affirmed on appeal from D. C. M. D. Fla. MR. JUSTICE DOUGLAS would note probable jurisdiction and set case for oral argument. Reported below: 368 F. Supp. 369.

Appeals Dismissed

No. 72–1369. CARMACK ET AL. *v.* BUCKNER. Appeal from Sup. Ct. La. Motion of Federal National Mortgage

Assn. for leave to file a brief as *amicus curiae* granted. Appeal dismissed for want of substantial federal question. Reported below: 272 So. 2d 326.

No. 73–960. MARSHALL *v.* TEXAS. Appeal from Ct. Civ. App. Tex., 14th Sup. Jud. Dist., dismissed for want of substantial federal question.

No. 73–1517. BALTIMORE COUNTY ET AL. *v.* CHURCHILL, LTD., ET AL. Appeal from Ct. App. Md. dismissed for want of substantial federal question. Reported below: 271 Md. 1, 313 A. 2d 829.

No. 73–6518. CRANDALL *v.* TEXAS. Appeal from Ct. Crim. App. Tex. dismissed for want of substantial federal question.

No. 73–6519. WINKFIELD *v.* OHIO. Appeal from Ct. App. Ohio, Franklin County, dismissed for want of substantial federal question.

No. 73–1483. SIMMONS ET AL. *v.* GORTON, ATTORNEY GENERAL OF WASHINGTON, ET AL.; and

No. 73–1484. FRITZ ET AL. *v.* GORTON, ATTORNEY GENERAL OF WASHINGTON, ET AL. Appeals from Sup. Ct. Wash. Motion of Association of Washington Business, Inc., for substitution of representative of class party or in the alternative for leave to intervene in No. 73–1484 denied. Appeals dismissed for want of substantial federal question. Reported below: 83 Wash. 2d 275, 517 P. 2d 911.

No. 73–6220. DIGGS *v.* BERZAK, CHAIRMAN, BOARD OF APPEALS AND REVIEW, U. S. CIVIL SERVICE COMMISSION, ET AL. Appeal from C. A. D. C. Cir. dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied.

No. 73–6483. NIVAL *v.* NEW YORK. Appeal from Ct. App. N. Y. dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied. Reported below: 33 N. Y. 2d 391, 308 N. E. 2d 883.

Vacated and Remanded on Appeal

No. 73–1305. NEW HAMPSHIRE DEPARTMENT OF EMPLOYMENT SECURITY ET AL. *v.* PREGENT. Appeal from D. C. N. H. Judgment vacated and case remanded to consider question of mootness. Reported below: 361 F. Supp. 782.

Certiorari Granted—Vacated and Remanded

No. 71–1410. PISACANO ET AL. *v.* UNITED STATES. C. A. 2d Cir. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *United States* v. *Giordano,* 416 U. S. 505 (1974). Reported below: 459 F. 2d 259.

No. 72–158. BECKER ET AL. *v.* UNITED STATES. C. A. 2d Cir. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *United States* v. *Giordano,* 416 U. S. 505 (1974). Reported below: 461 F. 2d 230.

No. 72–1729. SIMONS *v.* UNITED STATES;

No. 72–6992. FAVANO *v.* UNITED STATES; and

No. 73–13. ROMANELLO ET AL. *v.* UNITED STATES. C. A. 2d Cir. Motion of petitioner in No. 72–6992 for leave to proceed *in forma pauperis* granted. Certiorari granted, judgments vacated, and cases remanded for further consideration in light of *United States* v. *Giordano,* 416 U. S. 505 (1974). Reported below: 478 F. 2d 1397.

No. 73–856. BYNUM ET AL. *v.* UNITED STATES. C. A. 2d Cir. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *United*

States v. *Giordano*, 416 U. S. 505 (1974). MR. JUSTICE DOUGLAS would reverse the judgment. *United States* v. *Giordano*, 416 U. S. 505, 580 (1974) (DOUGLAS, J., concurring), and *United States* v. *Chavez*, 416 U. S. 562, 580 (1974) (DOUGLAS, J., concurring in part and dissenting in part). Reported below: 485 F. 2d 490.

Miscellaneous Orders

No. 32, Orig. MISSOURI *v.* NEBRASKA. Motion to dismiss per stipulation denied without prejudice to parties' filing proper motion under Rule 60 of the Rules of this Court. *Kansas* v. *Colorado*, 382 U. S. 801 (1965); see *Washington* v. *Northern Securities Co.*, 201 U. S. 651 (1906). [For earlier orders herein, see, *e. g.*, 390 U. S. 993.]

No. A–1044. HOFFMAN ET UX. *v.* DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT ET AL. C. A. 5th Cir. Application for stay and continuation of injunction presented to MR. JUSTICE STEWART, and by him referred to the Court, denied.

No. A–1058. BUCK, DIRECTOR, COMMUNICATIONS AND MARKETING, CHICAGO TRANSIT AUTHORITY, ET AL. *v.* IMPEACH NIXON COMMITTEE ET AL. C. A. 7th Cir. Motion of respondents to shorten time in which to file petition for writ of certiorari denied.

No. A–1075 (73–1681). GEORGE STEINBERG & SON, INC. *v.* BUTZ, SECRETARY OF AGRICULTURE, ET AL. Application for stay of mandate of United States Court of Appeals for the Second Circuit presented to MR. JUSTICE DOUGLAS, and by him referred to the Court, denied. Reported below: 491 F. 2d 988.

No. A–1081. MARRIOTT CORP. ET AL. *v.* DISTRICT OF COLUMBIA MINIMUM WAGE AND INDUSTRIAL SAFETY BOARD. Ct. App. D. C. Application for stay of enforce-

ment of the Wage Order of the District of Columbia Minimum Wage and Industrial Safety Board presented to THE CHIEF JUSTICE, and by him referred to the Court, denied. The order of THE CHIEF JUSTICE heretofore entered May 13, 1974, is hereby vacated.

No. A–1093. MCDONALD ET AL. *v.* MCLUCAS, ACTING SECRETARY OF THE AIR FORCE, ET AL. D. C. S. D. N. Y. Application for stay of judgment and other relief presented to MR. JUSTICE DOUGLAS, and by him referred to the Court, denied. Reported below: 371 F. Supp. 831 and 837.

No. A–1124 (73–1745). HUME *v.* CAREY. C. A. D. C. Cir. Application for stay of judgment presented to THE CHIEF JUSTICE, and by him referred to the Court, denied. MR. JUSTICE DOUGLAS, MR. JUSTICE BRENNAN, and MR. JUSTICE MARSHALL would grant the stay. Reported below: 492 F. 2d 631.

No. 73–203. EISEN *v.* CARLISLE & JACQUELIN ET AL. C. A. 2d Cir. [Certiorari granted, 414 U. S. 908.] Motion of respondents for leave to file supplemental brief after argument granted.

No. 73–477. GERSTEIN *v.* PUGH ET AL. C. A. 5th Cir. [Certiorari granted, 414 U. S. 1062.] The Solicitor General is invited to file a brief in this case expressing the views of the United States.

No. 73–1575. CALLAHAN ET AL. *v.* KIMBALL ET AL. C. A. 9th Cir. The Solicitor General is invited to file a brief in this case expressing the views of the United States.

No. 73–631. HOWARD JOHNSON CO., INC. *v.* DETROIT LOCAL, JOINT EXECUTIVE BOARD, HOTEL & RESTAURANT EMPLOYEES & BARTENDERS INTERNATIONAL UNION, AFL–

CIO. C. A. 6th Cir. [Certiorari granted, 414 U. S. 1091.] Motion of petitioner for leave to file supplemental brief after argument granted.

No. 73–5772. FARETTA *v.* CALIFORNIA. Ct. App. Cal., 2d App. Dist. [Certiorari granted, 415 U. S. 975.] Motion of petitioner for appointment of counsel granted. It is ordered that Jerome B. Falk, Jr., Esquire, of San Francisco, California, a member of the Bar of this Court, be, and he is hereby, appointed to serve as counsel for petitioner in this case.

No. 73–1470. JONES ET AL. *v.* MEANS ET AL., EXECUTORS. Motion for leave to file petition for writ of certiorari denied.

No. 73–6339. GARNER *v.* DAGGETT, WARDEN, ET AL.; and

No. 73–6633. SCHWARTZ *v.* NEVADA ET AL. Motions for leave to file petitions for writs of habeas corpus denied.

No. 73–6476. KELLY *v.* STRUBBE, CLERK, U. S. COURT OF APPEALS;

No. 73–6513. CAMPBELL *v.* WADSWORTH, CLERK, U. S. COURT OF APPEALS, ET AL.; and

No. 73–6557. CAGLE *v.* DAGGETT, WARDEN, ET AL. Motions for leave to file petitions for writs of mandamus denied.

Probable Jurisdiction Noted

No. 73–1462. WHITE, SECRETARY OF STATE OF TEXAS, ET AL. *v.* REGESTER ET AL. Appeal from D. C. W. D. Tex. Probable jurisdiction noted. MR. JUSTICE DOUGLAS would affirm the judgment. Reported below: 378 F. Supp. 640.

Certiorari Granted

No. 73–1121. NORTH GEORGIA FINISHING, INC. *v.* DI-CHEM, INC. Sup. Ct. Ga. Certiorari granted. Reported below: 231 Ga. 260, 201 S. E. 2d 321.

No. 73–1446. ROE ET AL. *v.* DOE. Ct. App. N. Y. Certiorari granted. Reported below: 33 N. Y. 2d 902, 307 N. E. 2d 823.

No. 73–64. IANNELLI ET AL. *v.* UNITED STATES. C. A. 3d Cir. Certiorari granted limited to Question 2 presented by the petition which reads as follows: "Whether petitioners' convictions of conspiracy represent a duplication of their convictions of violating 18 U. S. C. § 1955 and require that the conspiracy convictions be reversed." Reported below: 477 F. 2d 999.

No. 73–1233. NATIONAL LABOR RELATIONS BOARD ET AL. *v.* SEARS, ROEBUCK & Co. C. A. D. C. Cir. Certiorari granted and set for oral argument with No. 73–1316 [immediately *infra*]. MR. JUSTICE POWELL took no part in the consideration or decision of this petition. Reported below: 156 U. S. App. D. C. 303, 480 F. 2d 1195.

No. 73–1316. RENEGOTIATION BOARD *v.* GRUMMAN AIRCRAFT ENGINEERING CORP. C. A. D. C. Cir. Certiorari granted and case set for oral argument with No. 73–1233 [immediately *supra*]. MR. JUSTICE POWELL took no part in the consideration or decision of this petition. Reported below: 157 U. S. App. D. C. 121, 482 F. 2d 710.

No. 73–1279. WILLIAMS & WILKINS CO. *v.* UNITED STATES. Ct. Cl. Certiorari granted. MR. JUSTICE BRENNAN and MR. JUSTICE BLACKMUN took no part in the consideration or decision of this petition. Reported below: 203 Ct. Cl. 74, 487 F. 2d 1345.

No. 73–1471. UNITED STATES ET AL. *v.* NEW JERSEY STATE LOTTERY COMMISSION. C. A. 3d Cir. Motion of

National Association of Broadcasters for leave to file a brief as *amicus curiae* and certiorari granted. Reported below: 491 F. 2d 219.

No. 73–1395. UNITED STATES *v.* WILSON. C. A. 3d Cir. Certiorari granted and case set for oral argument with No. 73–1513 [immediately *infra*]. Reported below: 492 F. 2d 1345.

No. 73–1513. UNITED STATES *v.* JENKINS. C. A. 2d Cir. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari granted and case set for oral argument with No. 73–1395 [immediately *supra*]. Reported below: 490 F. 2d 868.

Certiorari Denied. (See also Nos. 73–6220 and 73–6483, *supra.*)

No. 72–1404. CAPERS ET AL. *v.* CUYAHOGA COUNTY BOARD OF ELECTIONS ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 472 F. 2d 1225.

No. 72–1475. UNITED STATES *v.* ROBERTS ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 477 F. 2d 57.

No. 73–170. CRENSHAW COUNTY PRIVATE SCHOOL FOUNDATION, DBA CRENSHAW CHRISTIAN ACADEMY *v.* SIMON, SECRETARY OF THE TREASURY, ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 474 F. 2d 1185 and 475 F. 2d 1404.

No. 73–801. SMITH *v.* LOSEE ET AL. C. A. 10th Cir. Certiorari denied. Reported below: 485 F. 2d 334.

No. 73–888. SELLERS ET AL. *v.* UNITED STATES; and No. 73–889. CARR *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 483 F. 2d 37.

No. 73–933. PARSONS ET AL. *v.* KNOPP ET UX. Sup. Ct. App. W. Va. Certiorari denied.

No. 73–972. CARFORA *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 489 F. 2d 354.

No. 73–1006. MARTIN-TRIGONA *v.* SUPREME COURT OF ILLINOIS. Sup. Ct. Ill. Certiorari denied. Reported below: 55 Ill. 2d 301, 302 N. E. 2d 68.

No. 73–1021. STATES *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 488 F. 2d 761.

No. 73–1085. WALKER *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 485 F. 2d 686.

No. 73–1086. MASCOLO ET AL. *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 486 F. 2d 1397.

No. 73–1103. MEMMOLO *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied.

No. 73–1147. VOGT *v.* OSWALD, CORRECTION COMMISSIONER, ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 486 F. 2d 1398.

No. 73–1153. UNITED STATES *v.* WILLIAM GREEN CONSTRUCTION CO., INC., ET AL.; and

No. 73–1314. WILLIAM GREEN CONSTRUCTION CO., INC., ET AL. *v.* UNITED STATES. Ct. Cl. Certiorari denied. Reported below: 201 Ct. Cl. 616, 477 F. 2d 930.

No. 73–1204. SQUIRE *v.* VIRGINIA. Sup. Ct. Va. Certiorari denied. Reported below: 214 Va. 260, 199 S. E. 2d 534.

No. 73–1230. LASALLE EXTENSION UNIVERSITY *v.* FEDERAL TRADE COMMISSION. C. A. 7th Cir. Certiorari denied. Reported below: 486 F. 2d 1406.

No. 73–1237. MEANS, JUDGE *v.* OKLAHOMA EX REL. FALLIS, DISTRICT ATTORNEY OF TULSA COUNTY. Ct. Crim. App. Okla. Certiorari denied.

No. 73–1243. BRIN ET AL. *v.* UNITED STATES ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 489 F. 2d 757.

No. 73–1251. FELTON, WARDEN *v.* SAIKEN. C. A. 7th Cir. Certiorari denied. Reported below: 489 F. 2d 865.

No. 73–1258. TANNER ET AL. *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 486 F. 2d 1406.

No. 73–1266. KENNEBEC LOG DRIVING CO. ET AL. *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied. Reported below: 491 F. 2d 562.

No. 73–1298. CHERRY ET AL. *v.* SMITH ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 489 F. 2d 1098.

No. 73–1304. DENTE *v.* INTERNATIONAL ORGANIZATION OF MASTERS, MATES & PILOTS, LOCAL 90. C. A. 9th Cir. Certiorari denied. Reported below: 492 F. 2d 10.

No. 73–1326. ELGIN, JOLIET & EASTERN RAILWAY CO. *v.* FERAK, SPECIAL ADMINISTRATOR. Sup. Ct. Ill. Certiorari denied. Reported below: 55 Ill. 2d 596, 304 N. E. 2d 619.

No. 73–1355. KUNTZWEILER *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 487 F. 2d 426.

No. 73–1361. BALDRIDGE ET AL. *v.* HADLEY ET AL. C. A. 10th Cir. Certiorari denied. Reported below: 491 F. 2d 859.

No. 73–1365. PALO ALTO TENANTS' UNION ET AL. *v.* PALO ALTO CITY MANAGER ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 487 F. 2d 883.

No. 73–1373. SHEPARD ET UX. *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 3d Cir. Certiorari denied. Reported below: 481 F. 2d 1399.

No. 73–1374. GARLOCK INC. *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 2d Cir. Certiorari denied. Reported below: 489 F. 2d 197.

No. 73–1383. GINGERICH ET AL. *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied.

No. 73–1385. KNAPP *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 489 F. 2d 758.

No. 73–1393. WHETSTONE *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 492 F. 2d 1244.

No. 73–1449. CARNEY *v.* CENTRAL NEW YORK FREIGHTWAYS ET AL. Super. Ct. N. J. Certiorari denied.

No. 73–1450. IN RE COREY. Sup. Ct. Hawaii. Certiorari denied. Reported below: 55 Haw. 47 and 64, 515 P. 2d 400.

No. 73–1455. EVANS ET AL. *v.* CALIFORNIA. Ct. App. Cal., 2d App. Dist. Certiorari denied. Reported below: 34 Cal. App. 3d 175, 109 Cal. Rptr. 719.

No. 73–1458. LOUISIANA ET AL. *v.* GULF STATES THEATRES OF LOUISIANA, INC., ET AL. Sup. Ct. La. Certiorari denied. Reported below: 270 So. 2d 547.

No. 73–1460. KIRBY, DBA QUIK CHEK OF INDIANA, ET AL. *v.* P. R. MALLORY & CO., INC. C. A. 7th Cir. Certiorari denied. Reported below: 489 F. 2d 904.

No. 73–1469. LOHF, TRUSTEE IN BANKRUPTCY *v.* TRAVELERS INDEMNITY CO. C. A. 10th Cir. Certiorari denied.

No. 73–1472. MIGLIORINI *v.* NEW YORK. App. Div., Sup. Ct. N. Y., 2d Jud. Dept. Certiorari denied. Reported below: 43 App. Div. 2d 731, 351 N. Y. S. 2d 369.

No. 73–1480. UMPHREY ET AL. *v.* MCGRAW-EDISON CO. C. A. 7th Cir. Certiorari denied. Reported below: 489 F. 2d 757.

No. 73–1482. MANZARDO ET AL. *v.* PULLMAN CO. ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 489 F. 2d 757.

No. 73–1493. ALLEN *v.* HOWARD. C. A. 4th Cir. Certiorari denied. Reported below: 487 F. 2d 1397.

No. 73–1497. INTERNATIONAL LONGSHOREMEN'S & WAREHOUSEMEN'S UNION, LOCAL 21 *v.* REYNOLDS METALS CO. C. A. 9th Cir. Certiorari denied. Reported below: 487 F. 2d 696.

No. 73–1498. LEE *v.* TEXAS. Ct. Crim. App. Tex. Certiorari denied. Reported below: 503 S. W. 2d 244.

No. 73–1499. LONGSHORE ET AL. *v.* SALUDA COUNTY SCHOOL DISTRICT NO. 1 OF SALUDA COUNTY, SOUTH CAROLINA, ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 488 F. 2d 804.

No. 73–1514. BRYAN *v.* FLORIDA. Sup. Ct. Fla. Certiorari denied. Reported below: 287 So. 2d 73.

No. 73–1550. HEARD *v.* AMERICAN UNIVERSITY. C. A. D. C. Cir. Certiorari denied. Reported below: 159 U. S. App. D. C. 342, 487 F. 2d 1213.

No. 73–1597. LANSING *v.* NEW YORK STOCK EXCHANGE. C. A. 2d Cir. Certiorari denied. Reported below: 490 F. 2d 1406.

No. 73–1607. HAWAIIAN AIRLINES, INC. *v.* ALOHA AIRLINES, INC. C. A. 9th Cir. Certiorari denied. Reported below: 489 F. 2d 203.

No. 73–6080. PERKINS *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied. Reported below: 488 F. 2d 652.

No. 73–6094. NELSON *v.* UNITED STATES; and
No. 73–6368. HENDERSON *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 489 F. 2d 802.

No. 73–6135. WALLACE *v.* WEINBERGER, SECRETARY OF HEALTH, EDUCATION, AND WELFARE. C. A. 9th Cir. Certiorari denied. Reported below: 488 F. 2d 606.

No. 73–6170. MASON *v.* GOLLMAR, JUDGE. Sup. Ct. Wis. Certiorari denied.

No. 73–6223. CURTIS *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 491 F. 2d 749.

No. 73–6225. ISAAC *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 489 F. 2d 753.

No. 73–6228. LOTT *v.* FLORIDA. Sup. Ct. Fla. Certiorari denied. Reported below: 286 So. 2d 565.

No. 73–6232. WASHABAUGH *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied.

No. 73–6235. ZAVALA *v.* CALIFORNIA. Ct. App. Cal., 2d App. Dist. Certiorari denied.

No. 73–6237. JENNINGS *v.* WAINWRIGHT, CORRECTIONS DIRECTOR. C. A. 5th Cir. Certiorari denied. Reported below: 486 F. 2d 1041.

No. 73–6242. KALMBACH *v.* JONES, SHERIFF. C. A. 5th Cir. Certiorari denied. Reported below: 488 F. 2d 134.

No. 73–6254. FAULKNER *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 488 F. 2d 328.

No. 73–6268. BACCARI ET AL. *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 489 F. 2d 274.

No. 73–6276. SWEENEY *v.* NEW YORK. App. Div., Sup. Ct. N. Y., 2d Jud. Dept. Certiorari denied. Reported below: 43 App. Div. 2d 564, 349 N. Y. S. 2d 63.

No. 73–6279. DAY *v.* WISCONSIN. Sup. Ct. Wis. Certiorari denied. Reported below: 61 Wis. 2d 236, 212 N. W. 2d 489.

No. 73–6282. WINDHAM *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 487 F. 2d 67.

No. 73–6286. WILLIAMS *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 489 F. 2d 755.

No. 73–6287. BATTEN *v.* VIRGINIA. Sup. Ct. Va. Certiorari denied.

No. 73–6288. WALKER *v.* UNITED STATES; and
No. 73–6356. HOLLAND *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 489 F. 2d 754.

No. 73–6312. DICKSON *v.* ESTELLE, CORRECTIONS DIRECTOR. C. A. 5th Cir. Certiorari denied.

No. 73–6314. BUTLER *v.* CALIFORNIA. Ct. App. Cal., 2d App. Dist. Certiorari denied.

No. 73–6351. MOORE ET AL. *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied.

No. 73–6359. GARRETT *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 489 F. 2d 756.

No. 73–6362. MILLER *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied.

No. 73–6380. ENNIS *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 488 F. 2d 484.

No. 73–6398. SMITH *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 485 F. 2d 686.

No. 73–6400. CAMP *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 486 F. 2d 1405.

No. 73–6405. PEREZ *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied.

No. 73–6409. ROBERTSON *v.* UNITED STATES. C. A. D. C. Cir. Certiorari denied. Reported below: 159 U. S. App. D. C. 343, 487 F. 2d 1214.

No. 73–6411. WALLACE *v.* SECRETARY, DEPARTMENT OF HEALTH, EDUCATION, AND WELFARE. C. A. 8th Cir. Certiorari denied.

No. 73–6415. KALE *v.* UNITED STATES ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 489 F. 2d 449.

No. 73–6418. SARTIN *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 487 F. 2d 1404.

No. 73–6423. BRUCE *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 492 F. 2d 1239.

No. 73–6429. HEAD *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied.

No. 73–6431. WILLIAMS *v.* RICHMOND GUANO CO. ET AL. Sup. Ct. Va. Certiorari denied.

No. 73–6433. SALVO *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 493 F. 2d 1402.

No. 73–6439. SIN NAGH FONG *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 490 F. 2d 527 and 491 F. 2d 1391.

No. 73–6468. CULPEPPER *v.* NEW YORK. Ct. App. N. Y. Certiorari denied. Reported below: 33 N. Y. 2d 837, 307 N. E. 2d 48.

No. 73–6471. AL-KANANI *v.* NEW YORK. Ct. App. N. Y. Certiorari denied. Reported below: 33 N. Y. 2d 260, 307 N. E. 2d 43.

No. 73–6482. WALLACE ET VIR *v.* DIXON ET AL. C. A. 8th Cir. Certiorari denied.

No. 73–6486. PUGACH *v.* NEW YORK. Sup. Ct. N. Y., Bronx County. Certiorari denied.

No. 73–6491. WOODS *v.* TODD ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 490 F. 2d 990.

No. 73–6495. MURGUIA *v.* INDUSTRIAL COMMISSION OF ARIZONA ET AL. Ct. App. Ariz. Certiorari denied.

No. 73–6496. SLOCUM *v.* HOPPER, WARDEN. C. A. 5th Cir. Certiorari denied.

No. 73–6502. CHATMAN *v.* CALIFORNIA. Ct. App. Cal., 5th App. Dist. Certiorari denied.

No. 73–6503. COLE *v.* TENNESSEE. Ct. Crim. App. Tenn. Certiorari denied.

No. 73–6515. ARTIS *v.* VIRGINIA. Sup. Ct. Va. Certiorari denied.

No. 73–6525. MENDES *v.* RAILWAY EXPRESS AGENCY, INC., ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 489 F. 2d 752.

No. 73–6526. GEIGER *v.* WAINWRIGHT, CORRECTIONS DIRECTOR. C. A. 5th Cir. Certiorari denied. Reported below: 490 F. 2d 990.

No. 73–6528. JENKINS *v.* WAINWRIGHT, CORRECTIONS DIRECTOR. C. A. 5th Cir. Certiorari denied. Reported below: 488 F. 2d 136.

No. 73–6529. COCKSHUTT *v.* MCCARTHY, MEN'S COLONY SUPERINTENDENT. C. A. 9th Cir. Certiorari denied.

No. 73–6539. MORGAN *v.* TEXAS. Ct. Crim. App. Tex. Certiorari denied. Reported below: 502 S. W. 2d 722.

No. 73–6542. GAUSE *v.* ARIZONA. Sup. Ct. Ariz. Certiorari denied.

No. 73–6546. CALIA *v.* OREGON. Sup. Ct. Ore. Certiorari denied. Reported below: See 15 Ore. App. 110, 514 P. 2d 1354.

No. 73–6547. IMESON *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 9th Cir. Certiorari denied. Reported below: 487 F. 2d 319.

No. 73–6559. MAHONEY *v.* CARDWELL, WARDEN. C. A. 9th Cir. Certiorari denied.

No. 73–6570. HALL *v.* ALABAMA. Ct. Crim. App. Ala. Certiorari denied.

No. 72–863. FIORELLA ET AL. *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. MR. JUSTICE DOUGLAS would grant certiorari. Reported below: 468 F. 2d 688.

No. 72–1267. CUZZO *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. MR. JUSTICE DOUGLAS would grant certiorari. Reported below: 472 F. 2d 1404.

No. 72–1304. CAFERO ET AL. *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. MR. JUSTICE DOUGLAS would grant certiorari. Reported below: 473 F. 2d 489.

No. 72–1484. POSNER *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. MR. JUSTICE DOUGLAS would grant certiorari. Reported below: 477 F. 2d 57.

No. 72–1588. DELVECCHIO ET AL. *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. MR. JUSTICE DOUGLAS would grant certiorari. Reported below: 475 F. 2d 1396.

No. 72–1605. FINO ET AL. *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. MR. JUSTICE DOUGLAS would grant certiorari. Reported below: 478 F. 2d 35.

No. 72–5278. COX ET AL. *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. MR. JUSTICE DOUGLAS would grant certiorari. Reported below: 462 F. 2d 1293.

No. 73–103. IANNELLI *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. MR. JUSTICE DOUGLAS would grant certiorari. Reported below: 480 F. 2d 919.

No. 73–903. CONSIGLIO ET AL. *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. MR. JUSTICE DOUGLAS would grant certiorari. Reported below: 486 F. 2d 1397.

No. 73–999. KOHNE ET AL. *v.* UNITED STATES;

No. 73–5819. DENHAM ET UX. *v.* UNITED STATES; and

No. 73–6015. TABELLA *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. MR. JUSTICE DOUGLAS would grant certiorari. Reported below: 487 F. 2d 1395.

No. 73–1105. MERHIGE ET AL., U. S. DISTRICT JUDGES *v.* UNITED STATES BOARD OF PAROLE. C. A. 4th Cir. Certiorari denied. MR. JUSTICE DOUGLAS would grant certiorari. Reported below: 487 F. 2d 25.

No. 73–1146. TESTA *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. MR. JUSTICE DOUGLAS would grant certiorari. Reported below: 486 F. 2d 1013.

No. 73–1192. PFINGST *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. MR. JUSTICE DOUGLAS would grant certiorari. Reported below: 490 F. 2d 262.

No. 73–1239. DUROVIC *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 7th Cir. Certiorari denied. MR. JUSTICE DOUGLAS would grant certiorari. Reported below: 487 F. 2d 36.

No. 73–1257. KIRBY *v.* UNITED STATES. Ct. Cl. Certiorari denied. MR. JUSTICE DOUGLAS would grant certiorari. Reported below: 201 Ct. Cl. 527.

No. 73–1311. PAPADOPOULOS *v.* OREGON STATE BOARD OF HIGHER EDUCATION. Ct. App. Ore. Certiorari denied. MR. JUSTICE DOUGLAS would grant certiorari. Reported below: 14 Ore. App. 130, 511 P. 2d 854.

No. 73–5730. DIPIETRO *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. MR. JUSTICE DOUGLAS would grant certiorari. Reported below: 486 F. 2d 1397.

No. 73–6256. NUCCIO *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. MR. JUSTICE DOUGLAS would grant certiorari. Reported below: 487 F. 2d 462.

No. 73–6274. BRADSHAW *v.* FLORIDA. Sup. Ct. Fla. Certiorari denied. MR. JUSTICE DOUGLAS would grant certiorari. Reported below: 286 So. 2d 4.

No. 73–6284. SPRIGGS *v.* UNITED STATES. C. A. D. C. Cir. Certiorari denied. MR. JUSTICE DOUGLAS would grant certiorari. Reported below: 159 U. S. App. D. C. 57, 486 F. 2d 1317.

No. 73–6300. LUTON *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. MR. JUSTICE DOUGLAS would grant certiorari. Reported below: 486 F. 2d 1021.

No. 73–6301. LUTON *v.* MISSISSIPPI. Sup. Ct. Miss. Certiorari denied. MR. JUSTICE DOUGLAS would grant certiorari. Reported below: 287 So. 2d 269.

No. 73–6310. CARTER *v.* SLAYTON, PENITENTIARY SUPERINTENDENT. C. A. 4th Cir. Certiorari denied. MR. JUSTICE DOUGLAS would grant certiorari. Reported below: 485 F. 2d 684.

No. 73–6316. PETER *v.* ILLINOIS. Sup. Ct. Ill. Certiorari denied. MR. JUSTICE DOUGLAS would grant certiorari. Reported below: 55 Ill. 2d 443, 303 N. E. 2d 398.

No. 73–6402. CAIN *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. MR. JUSTICE DOUGLAS would grant certiorari. Reported below: 483 F. 2d 1401.

No. 73–6478. JEFFRIES *v.* ARKANSAS. Sup. Ct. Ark. Certiorari denied. MR. JUSTICE DOUGLAS would grant certiorari. Reported below: 255 Ark. 501, 501 S. W. 2d 600.

No. 73–1320. UNITED STATES *v.* KING ET AL. C. A. 9th Cir. Motion of respondent Olson for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 478 F. 2d 494.

No. 72–1476. UNITED STATES *v.* MANTELLO ET AL. C. A. D. C. Cir. Motion of respondents Berman et al. for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 156 U. S. App. D. C. 2, 478 F. 2d 671.

No. 73–1003. NATIONAL INDIAN YOUTH COUNCIL ET AL. *v.* BRUCE ET AL. C. A. 10th Cir. Motion of peti-

tioners to strike brief of respondents and certiorari denied. MR. JUSTICE DOUGLAS would grant certiorari. Reported below: 485 F. 2d 97.

No. 73–1008. PORTLAND CEMENT CORP. *v.* ADMINISTRATOR, ENVIRONMENTAL PROTECTION AGENCY. C. A. D. C. Cir. Certiorari denied. MR. JUSTICE POWELL took no part in the consideration or decision of this petition. Reported below: 158 U. S. App. D. C. 308, 486 F. 2d 375.

No. 73–1275. NATURAL GAS PIPELINE COMPANY OF AMERICA *v.* TRANSCONTINENTAL GAS PIPE LINE CORP. ET AL. C. A. D. C. Cir. Certiorari denied. MR. JUSTICE POWELL took no part in the consideration or decision of this petition. Reported below: 160 U. S. App. D. C. 1, 488 F. 2d 1325.

No. 73–1180. TIDEE PRODUCTS, INC. *v.* NATIONAL LABOR RELATIONS BOARD ET AL.; and

No. 73–1423. INTERNATIONAL UNION OF ELECTRICAL, RADIO & MACHINE WORKERS, AFL–CIO *v.* NATIONAL LABOR RELATIONS BOARD ET AL. Petition for certiorari before judgment by C. A. D. C. Cir. Motion of the Chamber of Commerce of the United States for leave to file a brief as *amicus curiae* in No. 73–1180 granted. Certiorari denied.

No. 73–1507. PARKER, JAIL SUPERINTENDENT *v.* GLINSEY ET AL. C. A. 6th Cir. Motion of respondents for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 491 F. 2d 337.

No. 73–6230. BRESCIA *v.* NEW JERSEY. Super Ct. N. J. Certiorari denied.

MR. JUSTICE MARSHALL, with whom MR. JUSTICE BRENNAN joins, dissenting.

Petitioner was convicted in state court of assault and battery on a police officer. Because petitioner

was indigent, the court had appointed a member of the local Public Defender's office to represent him. On the morning of the first day of trial, this appointed attorney informed the court that he was not sufficiently prepared to go to trial, and that, in any case, he did not feel that he should continue as defense counsel because he had a close personal association with the State's key witness. The judge agreed that the attorney should be replaced but insisted the trial begin that day. Another member of the Public Defender's office, who happened to be in the courtroom at the time, was appointed as substitute counsel. The new attorney vigorously protested that he was totally unprepared and sought a continuance, but to no avail. The trial judge gave him just the noon recess to review his predecessor's inadequate files and to prepare for trial. When the attorney returned to the courtroom barely more than an hour later, he again protested his lack of preparation. The judge responded:

> "Lack of investigation lays at the doorstep of the Public Defender, not you. . . . The Public Defender's office should have done all of these things."

The trial thereupon began.

At the end of the first day, the lawyer complained that he had not even seen relevant material in the hands of the prosecution. The trial judge asked the District Attorney to provide defense counsel with a copy of a police report to look at overnight. On the morning of the second day of trial, defense counsel, still seriously concerned about his lack of familiarity with the case, moved for a mistrial. He cited his "lack of opportunity for any adequate investigation, interview of witnesses, review of the Grand Jury minutes and other necessary investigation . . . ." Terming defendant's trial a "mockery," counsel argued that he was simply unprepared

and could not render adequate assistance of counsel to his client. The judge responded:

> "Your office is charged with the responsibility of making the investigation. . . . Notice is served on the Public Defender's office that when they receive notices from my secretary and receive notices from the Prosecutor [of the trial date], they are not coming in here and asking at the last moment for an adjournment on the basis they are not prepared."

The motion for a mistrial was denied and the trial continued subject to counsel's protests. Defense counsel's lack of preparation manifested itself throughout the trial. At one point, he advised the court that his consultations with his client indicated that the defense would have to call several witnesses. The trial judge allowed counsel to notify his office in this regard. Once the witnesses were subpoenaed and in court, the judge granted defense counsel a few moments to interview them for the first and only time before they took the stand.

Petitioner was convicted and sentenced to serve three to five years in state prison. The Appellate Division of the Superior Court affirmed the conviction and the New Jersey Supreme Court denied a petition for certification.

Petitioner asserts that by forcing him to trial with a woefully unprepared attorney, the court denied him his constitutionally guaranteed right to the effective assistance of counsel. The centrality of the right to counsel among the rights accorded a criminal defendant is self-evident:

> "Of all of the rights that an accused person has, the right to be represented by counsel is by far the most pervasive, for it affects his ability to assert any other rights he may have." [1]

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[1] Schaefer, Federalism and State Criminal Procedure, 70 Harv. L. Rev. 1, 8 (1956).

And this Court has repeatedly recognized that the right to counsel is the right to his effective assistance.[2] In the seminal right-to-counsel case, *Powell* v. *Alabama*, 287 U. S. 45 (1932), the Court warned that the State's obligation to provide counsel is "not discharged by an assignment at such a time or under such circumstances as to preclude the giving of effective aid in the preparation and trial of the case." *Id.*, at 71. Accordingly, the Court has found it "a denial of the accused's constitutional right to a fair trial to force him to trial with such expedition as to deprive him of the effective aid and assistance of counsel." *White* v. *Ragen*, 324 U. S. 760, 764 (1945).

Timely appointment and opportunity for adequate preparation are absolute prerequisites for counsel to fulfill his constitutionally assigned role of seeing to it that available defenses are raised and the prosecution put to its proof. Cf. *United States* v. *Ash*, 413 U. S. 300, 312–313 (1973); *Powell* v. *Alabama*, *supra*, at 71.

> "Adequate preparation for trial often may be a more important element in the effective assistance of counsel to which a defendant is entitled than the forensic skill exhibited in the courtroom. The careful investigation of a case and the thoughtful analysis of the information it yields may disclose evidence of which even the defendant is unaware and may suggest issues and tactics at trial which would otherwise not emerge." *Moore* v. *United States*, 432 F. 2d 730, 735 (CA3 1970) (en banc).[3]

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[2] See, *e. g.*, *McMann* v. *Richardson*, 397 U. S. 759, 771 n. 14 (1970).

[3] See *United States* v. *DeCoster*, 159 U. S. App. D. C. 326, 487 F. 2d 1197 (1973); *Coles* v. *Peyton*, 389 F. 2d 224 (CA4 1968). See generally American Bar Association Project on Standards for Criminal Justice, Prosecution and Defense Function § 4.1 (Approved Draft 1971), and Providing Defense Services § 5.1 (Approved Draft 1971); Bazelon, The Defective Assistance of Counsel, 42 U. Cinn. L. Rev. 1 (1973).

This Court has refused to adopt a *per se* rule as to when a late appointment renders representation ineffective and has held that the circumstances of each case must be examined to determine what constitutes a reasonable amount of time in which to prepare a case. *Chambers* v. *Maroney*, 399 U. S. 42 (1970). But the Court long ago cautioned that "the denial of opportunity for appointed counsel to confer, to consult with the accused and to prepare his defense, could convert the appointment of counsel into a sham and nothing more than a formal compliance with the Constitution's requirement that an accused be given the assistance of counsel." *Avery* v. *Alabama*, 308 U. S. 444, 446 (1940). It is inconceivable that the noon recess afforded petitioner's new attorney an ample opportunity to adequately prepare for the four-day trial that followed. When he went to trial, counsel had barely met his own client, had interviewed none of the ten other witnesses called, had not obtained any of the grand jury minutes, had no opportunity for pretrial discovery or even to secure a bill of particulars, had never had access to information in the prosecutor's file, and clearly had no time to develop a trial strategy.

This is not a case where counsel had ample opportunity to prepare a defense but failed to do so because his client was uncooperative or for some other reason. This case does not involve a trial judge's power to set a trial date which affords counsel adequate time to prepare and then insist that, absent unusual circumstances, counsel commence trial on that date. If petitioner had gone to trial with his original attorney this would be a different case. But that attorney was relieved, and counsel who was appointed in his stead had likely never seen or heard of petitioner's case until little more than an hour before the trial began. Cf. *Ungar* v. *Sarafite*, 376 U. S. 575, 589 (1964).

The State argues that both petitioner's original and his substitute attorney were from the same Public Defender agency, and that the agency had sufficient time to prepare. The trial judge repeatedly indicated that he was going to continue the trial because "[l]ack of investigation lays at the doorstep of the Public Defender, not [the substitute attorney]." The issue in determining whether a defendant has been deprived of the effective assistance of counsel is not whether the defense attorney is culpable for the failure but only whether, for whatever reason, he has failed to fulfill the essential role imposed on him by the Sixth Amendment. No matter upon whose doorstep the judge cared to lay blame for counsel's lack of preparation, the cost of the failure should not have been visited upon the defendant—who was without responsibility.

It is axiomatic that "[t]he defendant needs counsel and counsel needs time." *Hawk* v. *Olson*, 326 U. S. 271, 278 (1945). Here, counsel did not have "time" and as a result defendant may well have been deprived of his right to the adequate assistance of counsel guaranteed by the Constitution.

I would grant certiorari and set this case for argument.

No. 73–6579. MAYER *v.* MOEYKENS. C. A. 2d Cir. Certiorari denied. THE CHIEF JUSTICE and MR. JUSTICE BLACKMUN, upon suggestion of petitioner's death prior to filing of petition for certiorari, would dismiss petition. Reported below: 494 F. 2d 855.

Rehearing Denied

No. 72–5187. FAIR *v.* TAYLOR ET AL., 416 U. S. 918;

No. 72–6050. FROMMHAGEN *v.* BROWN, SECRETARY OF STATE OF CALIFORNIA, ET AL., 415 U. S. 724; and

No. 73–909. SMALDONE ET AL. *v.* UNITED STATES, 416 U. S. 936. Petitions for rehearing denied.

No. 73–5784. GREEN *v.* UNITED STATES, 416 U. S. 941;

No. 73–5863. VALLEY *v.* UNITED STATES, 416 U. S. 936;

No. 73–6008. MCGANN *v.* UNITED STATES BOARD OF PAROLE ET AL., 416 U. S. 958;

No. 73–6020. MCGANN ET AL. *v.* UNITED STATES BOARD OF PAROLE, 416 U. S. 958;

No. 73–6293. EASTER *v.* CALIFORNIA, 416 U. S. 945;

No. 73–6295. THOMAS *v.* ESTELLE, CORRECTIONS DIRECTOR, 416 U. S. 945; and

No. 73–6388. MCDONALD *v.* TENNESSEE ET AL., 416 U. S. 975. Petitions for rehearing denied.

No. 73–1282. FOUNTAIN ET AL. *v.* FOUNTAIN ET AL., 416 U. S. 939. Motion of Cheryl Y. Conway et al. for leave to file a brief as *amici curiae* in support of rehearing granted. Petition for rehearing denied.

MAY 31, 1974

Certiorari Granted

No. 73–1766. UNITED STATES *v.* NIXON, PRESIDENT OF THE UNITED STATES, ET AL. Petition for certiorari before judgment to C. A. D. C. Cir. Certiorari and motion for expedited schedule granted. Parties shall exchange and file briefs by 1 p. m. on June 21 and any responsive brief shall be filed by July 1, 1974. Oral argument set for July 8, 1974, at 10 a. m. Each party allowed one hour for argument. MR. JUSTICE REHNQUIST took no part in the consideration or decision of this motion and petition.

JUNE 3, 1974

Appeals Dismissed

No. 73–1568. ORRELL'S MUTUAL BURIAL ASSN., INC. *v.* ADAIR. Appeal from Sup. Ct. N. C. dismissed for want of substantial federal question. Reported below: 284 N. C. 534, 201 S. E. 2d 905.

No. 73–6272. ALMEIDA *v.* MASSACHUSETTS. Appeal from Dist. Ct. W. Norfolk County, Mass., dismissed for want of jurisdiction. 28 U. S. C. § 1257.

No. 73–6366. BRAY, DBA ROCKY MOUNTAIN MINT & DEPOSITORY *v.* UNITED STATES ET AL. Appeal from D. C. Utah dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied.

No. 73–6565. HAAS *v.* HAAS ET AL. Appeal from Sup. Ct. Mo. dismissed for want of substantial federal question. MR. JUSTICE DOUGLAS, MR. JUSTICE WHITE, and MR. JUSTICE BLACKMUN would note probable jurisdiction and set case for oral argument. Reported below: 504 S. W. 2d 44.

Miscellaneous Orders

No. A–1154. CAMPBELL ET AL. *v.* BEAUGHLER ET AL. Application for stay of judgment of dismissal by the United States District Court for the District of Arizona pending appeal to the United States Court of Appeals for the Ninth Circuit presented to MR. JUSTICE DOUGLAS, and by him referred to the Court, denied.

No. 73–6573. HUNTER *v.* PHILLIPS, CHIEF JUDGE, U. S. COURT OF APPEALS, ET AL.; and

No. 73–6580. GELLIS *v.* UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF GEORGIA ET AL. Motions for leave to file petitions for writs of mandamus denied.

Probable Jurisdiction Noted

No. 73–1475. HARRIS COUNTY COMMISSIONERS COURT ET AL. *v.* MOORE ET AL. Appeal from D. C. S. D. Tex. Probable jurisdiction noted. Reported below: 378 F. Supp. 1006.

Certiorari Granted

No. 73–1347. BOARD OF SCHOOL COMMISSIONERS OF INDIANAPOLIS ET AL. *v.* JACOBS ET AL. C. A. 7th Cir. Certiorari granted. Reported below: 490 F. 2d 601.

No. 73–1148. DECOTEAU, NATURAL MOTHER AND NEXT FRIEND OF FEATHER ET AL. *v.* DISTRICT COUNTY COURT FOR THE TENTH JUDICIAL DISTRICT. Sup. Ct. S. D. Certiorari granted and case set for oral argument with No. 73–1500 [immediately *infra*]. Reported below: — S. D. —, 211 N. W. 2d 843.

No. 73–1500. ERICKSON, WARDEN *v.* UNITED STATES EX REL. FEATHER ET AL. C. A. 8th Cir. Motions of respondents for leave to proceed *in forma pauperis* granted. Certiorari granted and case set for oral argument with No. 73–1148 [immediately *supra*]. Reported below: 489 F. 2d 99.

No. 73–1543. JOHNSON *v.* RAILWAY EXPRESS AGENCY, INC., ET AL. C. A. 6th Cir. Certiorari granted limited to Question 1 presented by the petition which reads as follows: "Whether the timely filing of a charge of employment discrimination with the Equal Employment Opportunity Commission pursuant to Section 706 of Title VII of the Civil Rights Act of 1964, 42 U. S. C. § 2000e–5, tolls the running of the period of limitation applicable to an action based on the same facts brought under the Civil Rights Act of 1866, 42 U. S. C. § 1981?" The Solicitor General is invited to file a brief as *amicus curiae* expressing the views of the United States. Reported below: 489 F. 2d 525.

Certiorari Denied. (See also No. 73–1157, *ante*, p. 279; and No. 73–6366, *supra*.)

No. 72–1245. ST. LOUIS-SAN FRANCISCO RAILWAY CO. *v.* UNITED STATES. Ct. Cl. Certiorari denied. Reported below: 200 Ct. Cl. 50, 470 F. 2d 523.

No. 73–73. AMF INC. *v.* UNITED STATES. Ct. Cl. Certiorari denied. Reported below: 201 Ct. Cl. 338, 476 F. 2d 1351.

No. 73–307. LUPIA *v.* STELLA D'ORO BISCUIT CO., INC.; and

No. 73–381. WINOKUR ET AL. *v.* BELL FEDERAL SAVINGS & LOAN ASSN. ET AL. C. A. 7th Cir. Certiorari denied.

No. 73–891. PURIN, AKA MOREIRA *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 486 F. 2d 1363.

No. 73–912. MULLIGAN ET AL. *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 488 F. 2d 732.

No. 73–939. CHAMBERS *v.* CHAMBERS. Sup. Ct. N. J. Certiorari denied.

No. 73–1274. DELTA AIR LINES, INC. *v.* CIVIL AERONAUTICS BOARD ET AL. C. A. D. C. Cir. Certiorari denied. Reported below: 162 U. S. App. D. C. 21, 497 F. 2d 608.

No. 73–1284. MERVIN *v.* FEDERAL TRADE COMMISSION. C. A. D. C. Cir. Certiorari denied. Reported below: 160 U. S. App. D. C. 148, 489 F. 2d 1272.

No. 73–1333. GENERAL TIRE & RUBBER CO. *v.* UNITED STATES. C. A. D. C. Cir. Certiorari denied. Reported below: 159 U. S. App. D. C. 343, 487 F. 2d 1214.

No. 73–1334. PEELE *v.* JONES, YOUTH CENTER SUPERINTENDENT. C. A. 4th Cir. Certiorari denied.

No. 73–1402. KEKOA, A MINOR, BY ENOMOTO, ET AL. *v.* RICHARDSON, JUSTICE, ET AL. Sup. Ct. Hawaii. Certio-

rari denied. Reported below: 55 Haw. 104, 516 P. 2d 1239.

No. 73–1417. SUSQUEHANNA COAL CO. *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 3d Cir. Certiorari denied. Reported below: 487 F. 2d 1395.

No. 73–1422. MARTINO *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 490 F. 2d 990.

No. 73–1427. DOSS *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied.

No. 73–1428. FENCL *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 489 F. 2d 759.

No. 73–1429. LOWE ET AL. *v.* UNION OIL CO. OF CALIFORNIA ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 487 F. 2d 477.

No. 73–1435. SADLER ET AL. *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 488 F. 2d 190 and 434.

No. 73–1439. GREENBANK *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 491 F. 2d 184.

No. 73–1443. UNIVERSITY OF HOUSTON ET AL. *v.* WURZER ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 488 F. 2d 552.

No. 73–1457. BISHOP *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 485 F. 2d 248.

No. 73–1463. KONIGSBERG ET AL. *v.* NIXON. C. A. 9th Cir. Certiorari denied.

No. 73–1481. UNION CAMP CORP. *v.* GYPSUM CARRIER, INC., ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 489 F. 2d 152.

No. 73–1524. HALLMARK INDUSTRY *v.* REYNOLDS METALS CO. ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 489 F. 2d 8.

No. 73–1528. NEWMAN *v.* SOUTH CAROLINA. Sup. Ct. S. C. Certiorari denied. Reported below: 261 S. C. 352, 200 S. E. 2d 82.

No. 73–1529. GENERAL TIRE & RUBBER CO. *v.* FIRESTONE TIRE & RUBBER CO. C. A. 6th Cir. Certiorari denied. Reported below: 489 F. 2d 1105.

No. 73–1532. GEILER, JUDGE *v.* COMMISSION ON JUDICIAL QUALIFICATIONS. Sup. Ct. Cal. Certiorari denied. Reported below: 10 Cal. 3d 270, 515 P. 2d 1.

No. 73–1534. HARRIS *v.* NEW YORK. County Ct. BROOME COUNTY, N. Y. Certiorari denied.

No. 73–1535. TROLL, EXECUTOR *v.* BORUT. C. A. 2d Cir. Certiorari denied. Reported below: 490 F. 2d 1406.

No. 73–1537. KING *v.* SHELBY RURAL ELECTRIC COOPERATIVE CORP. Ct. App. Ky. Certiorari denied. Reported below: 502 S. W. 2d 659.

No. 73–1539. ART NEON CO. ET AL. *v.* CITY AND COUNTY OF DENVER ET AL. C. A. 10th Cir. Certiorari denied. Reported below: 488 F. 2d 118.

No. 73–1542. VESCO & CO., INC. *v.* INTERNATIONAL CONTROLS CORP. C. A. 2d Cir. Certiorari denied. Reported below: 490 F. 2d 1334.

No. 73–1545. STATE BOARD OF EDUCATION OF OHIO ET AL. *v.* AKRON BOARD OF EDUCATION ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 490 F. 2d 1285.

No. 73–1546. MANZELLA *v.* ILLINOIS. Sup. Ct. Ill. Certiorari denied. Reported below: 56 Ill. 2d 187, 306 N. E. 2d 16.

No. 73–1551. TRANS WORLD AIRLINES, INC. *v.* DELTA AIR LINES, INC. C. A. 6th Cir. Certiorari denied. Reported below: 490 F. 2d 1036.

No. 73–1567. DART INDUSTRIES, INC. *v.* E. I. DU PONT DE NEMOURS & CO. C. A. 7th Cir. Certiorari denied. Reported below: 489 F. 2d 1359.

No. 73–1637. TRICO PRODUCTS CORP. *v.* ROBERK CO. C. A. 2d Cir. Certiorari denied. Reported below: 490 F. 2d 1280.

No. 73–5569. DAVIS *v.* CRAVEN, WARDEN. C. A. 9th Cir. Certiorari denied. Reported below: 485 F. 2d 1138.

No. 73–5938. HARRISON *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 487 F. 2d 389.

No. 73–6239. MILLER, AKA TAYLOR *v.* RICHERT ET AL. C. A. 9th Cir. Certiorari denied.

No. 73–6267. SMITH *v.* VIRGINIA. Sup. Ct. Va. Certiorari denied.

No. 73–6294. SOUZA *v.* MULLEN, WARDEN. C. A. 1st Cir. Certiorari denied. Reported below: 488 F. 2d 462.

No. 73–6297. TYLER *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 491 F. 2d 752.

No. 73–6307. TORSKE ET AL. *v.* WEINBERGER, SECRETARY OF HEALTH, EDUCATION, AND WELFARE. C. A. 9th Cir. Certiorari denied. Reported below: 484 F. 2d 59.

No. 73–6315. CARTER *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 490 F. 2d 1407.

No. 73–6324. PERNA *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 491 F. 2d 253.

No. 73–6344. JONES *v.* KEEMAN ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 488 F. 2d 1406.

No. 73–6440. CUNNINGHAM *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 490 F. 2d 991.

No. 73–6447. MCKERNIE *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied.

No. 73–6449. SHACKELFORD *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 494 F. 2d 67.

No. 73–6452. GOLDER *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 490 F. 2d 1407.

No. 73–6453. SIMON *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 488 F. 2d 1094.

No. 73–6454. MOORE *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 477 F. 2d 538.

No. 73–6456. GARNER *v.* UNITED STATES. C. A. D. C. Cir. Certiorari denied. Reported below: 160 U. S. App. D. C. 149, 489 F. 2d 1273.

No. 73–6457. DAVIS *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 491 F. 2d 1271.

No. 73–6461. EPPS *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 490 F. 2d 1407.

No. 73–6469. SAPP *v.* HASKINS, PENITENTIARY SUPERINTENDENT. C. A. 6th Cir. Certiorari denied. Reported below: 492 F. 2d 1244.

No. 73–6474. TORRES *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied.

No. 73–6479. O'CLAIR *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied.

No. 73–6481. PAIGE *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 493 F. 2d 22.

No. 73–6484. CRUZ ET AL. *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 492 F. 2d 217.

No. 73–6485. REVIRA, AKA PEREZ *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied.

No. 73–6553. PUGH *v.* PADERICK, PENITENTIARY SUPERINTENDENT. C. A. 4th Cir. Certiorari denied.

No. 73–6558. MOORE *v.* FLORIDA PAROLE AND PROBATION COMMISSION. Sup. Ct. Fla. Certiorari denied. Reported below: 289 So. 2d 719.

No. 73–6560. SPRINKLE ET AL. *v.* ILLINOIS. Sup. Ct. Ill. Certiorari denied. Reported below: 56 Ill. 2d 257, 307 N. E. 2d 161.

No. 73–6574. HOLLAND *v.* MARYLAND ET AL. C. A. 4th Cir. Certiorari denied.

No. 73–6575. MCCRACKEN *v.* ROSE, WARDEN. C. A. 6th Cir. Certiorari denied. Reported below: 493 F. 2d 1406.

No. 73–312. LIBERTY MUTUAL INSURANCE CO. *v.* DREW. C. A. 5th Cir. Motion of respondent for leave

to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 480 F. 2d 924.

No. 73–1525. ROSE, WARDEN *v.* RAY. C. A. 6th Cir. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 491 F. 2d 285.

No. 73–1215. LACOSA ET AL. *v.* UNITED STATES;
No. 73–1364. MANFREDI *v.* UNITED STATES; and
No. 73–6224. MAYO *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. MR. JUSTICE DOUGLAS would grant certiorari. Reported below: 488 F. 2d 588.

No. 73–5933. GALES *v.* VINCENT, CORRECTIONAL SUPERINTENDENT. C. A. 2d Cir. Certiorari denied. MR. JUSTICE DOUGLAS would grant certiorari.

No. 73–6049. MARSTON *v.* STATE FARM SUPERINTENDENT. C. A. 4th Cir. Certiorari denied. MR. JUSTICE DOUGLAS would grant certiorari. Reported below: 485 F. 2d 705.

No. 73–6305. O'BRIEN *v.* CALIFORNIA. Ct. App. Cal., 2d App. Dist. Certiorari denied. MR. JUSTICE DOUGLAS would grant certiorari.

No. 73–6328. O'KELLY *v.* IOWA. Sup. Ct. Iowa. Certiorari denied. MR. JUSTICE DOUGLAS would grant certiorari. Reported below: 211 N. W. 2d 589.

No. 73–6333. GARRETT *v.* PUCKETT, JAIL SUPERINTENDENT. C. A. 4th Cir. Certiorari denied. MR. JUSTICE DOUGLAS would grant certiorari.

No. 73–6352. GALVAN ET AL. *v.* LEVINE, INDUSTRIAL COMMISSIONER OF NEW YORK. C. A. 2d Cir. Certiorari denied. MR. JUSTICE DOUGLAS would grant certiorari. Reported below: 490 F. 2d 1255.

No. 73–6450. BROWN *v.* UNITED STATES; and

No. 73–6480. BROWN *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. MR. JUSTICE DOUGLAS would grant certiorari. Reported below: 491 F. 2d 748.

No. 73–1286. WADLEIGH-MAURICE, LTD., ET AL. *v.* TAGGART. C. A. 3d Cir. Motions of Motion Picture Association of America, Inc., and Authors League of America, Inc., for leave to file briefs as *amici curiae* granted. Certiorari denied. MR. JUSTICE DOUGLAS would grant certiorari. Reported below: 489 F. 2d 434.

Rehearing Denied

No. 73–5803. BEASLEY ET AL. *v.* UNITED STATES, 416 U. S. 941;

No. 73–6195. SAYLES *v.* GESELL, U. S. DISTRICT JUDGE, 416 U. S. 934; and

No. 73–6233. ALFORD *v.* UNITED STATES CIVIL SERVICE COMMISSION ET AL., 416 U. S. 959. Petitions for rehearing denied.

No. 73–988. CARLSON *v.* CALIFORNIA, 415 U. S. 985. Motion for leave to file petition for rehearing denied.

Assignment Order

An order of THE CHIEF JUSTICE designating and assigning Mr. Justice Clark (retired) to perform judicial duties in the United States Court of Appeals for the Eighth Circuit during the week of November 11, 1974, and for such additional time as may be required to prepare for the holding of such court or to complete unfinished business, pursuant to 28 U. S. C. § 294 (a), is ordered entered on the minutes of this Court, pursuant to 28 U. S. C. § 295.

JUNE 4, 1974

Dismissal Under Rule 60

No. 73–1464. LIROCCHI, DBA CABLE CLIMBERS SALES CO., ET AL. *v.* OHIO HOIST MANUFACTURING CO. C. A. 6th Cir. Petition for writ of certiorari dismissed under Rule 60 of the Rules of this Court. Reported below: 490 F. 2d 105.

JUNE 5, 1974

Dismissal Under Rule 60

No. 73–1745. HUME *v.* CAREY. C. A. D. C. Cir. Petition for writ of certiorari dismissed under Rule 60 of the Rules of this Court. Reported below: 160 U. S. App. D. C. 365, 492 F. 2d 631.

JUNE 10, 1974

Affirmed on Appeal

No. 73–1437. INDIANA REAL ESTATE COMMISSION ET AL. *v.* SATOSKAR. Affirmed on appeal from D. C. S. D. Ind. *In re Griffiths*, 413 U. S. 717 (1973). MR. JUSTICE REHNQUIST dissents.

Appeals Dismissed

No. 73–1322. ALONSO ET AL. *v.* GEORGIA. Appeal from Sup. Ct. Ga. dismissed for want of substantial federal question. Reported below: 231 Ga. 444, 202 S. E. 2d 37.

No. 73–1554. RAMSAY *v.* SANTA ROSA MEDICAL CENTER ET AL. Appeal from Ct. Civ. App. Tex., 4th Sup. Jud. Dist., dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied. Reported below: 498 S. W. 2d 741.

No. 73–1585. WATERS *v.* HENDERSON ET AL. Appeal from Ct. App. Tenn. dismissed for want of jurisdic-

tion. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied.

No. 73–6271. MICHAELS *v.* ARIZONA. Appeal from Sup. Ct. Ariz. dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied. Reported below: 110 Ariz. 98, 515 P. 2d 600.

MR. JUSTICE DOUGLAS, dissenting.

In March 1971, the appellant, a juvenile, was arrested in connection with a series of robberies of other juveniles in the vicinity of a local elementary school. The appellant was subsequently charged in Pima County, Arizona, Juvenile Court with delinquency by reason of law violations including five counts of armed robbery, one count of assault with a deadly weapon, and one count of theft. In April 1971, appellant was declared a delinquent; the court dismissed the theft count, reduced a count of robbery to attempted robbery, reduced the assault count to simple assault, and found the charges, as so modified, to have been established. At a dispositional hearing the appellant was placed on probation for an indefinite period. On appeal, the Arizona Supreme Court struck down a number of the charges as based upon identification testimony tainted by an illegal arrest of the appellant. But the court found that, after "[s]triking the charges which may have rested on tainted identifications, one count of attempted robbery still remains. Finding no clear error on this charge, we affirm that adjudication and the disposition order entered by the juvenile court." *In re Appeal of Pima County Anonymous,* 110 Ariz. 98, 103, 515 P. 2d 600, 605 (1973).

In the juvenile proceedings appellant was denied the right to a jury trial by Rule 7 of the Rules of Procedure

of the Juvenile Court. His case was heard by a Juvenile Court Judge who, pursuant to Ariz. Rev. Stat. Ann. §§ 8–202 to 8–205 (1956) and various Juvenile Court Rules, appoints and supervises the Juvenile Courts' prosecutorial staff. The appellant challenges the constitutionality of these statutes and rules.

Other aspects of this same juvenile court system were before the Court in *In re Gault,* 387 U. S. 1 (1967). There Gerald Gault had been adjudicated a delinquent and ordered confined until he reached majority, a sentence of more than five years, "in what is in all but name a penitentiary or jail." *Id.,* at 61 (Black, J., concurring). We held the juvenile process involving such harsh consequences was constitutionally deficient in not providing adequate written notice, advice as to appointed or retained counsel, the right to confrontation, and the privilege against self-incrimination.

Mr. Justice Black noted:

> "Where a person, infant or adult, can be seized by the State, charged, and convicted for violating a state criminal law, and then ordered by the State to be confined for six years, I think the Constitution requires that he be tried in accordance with the guarantees of all the provisions of the Bill of Rights made applicable to the States by the Fourteenth Amendment. Undoubtedly this would be true of an adult defendant, and it would be a plain denial of equal protection of the laws—an invidious discrimination—to hold that others subject to heavier punishment could, because they are children, be denied these same constitutional safeguards." *Ibid.*

Appellant faced the same possibility of confinement until he reached majority. Though his precise age is not disclosed, he faced at least three years of possible con-

finement since he was proceeded against as "a person under the age of eighteen years." Jurisdictional Statement App. xxii. As I stated in *McKeiver* v. *Pennsylvania*, 403 U. S. 528 (1971):

> "No adult could be denied a jury trial in those circumstances. *Duncan* v. *Louisiana*, 391 U. S. 145, 162. The Fourteenth Amendment, which makes trial by jury provided in the Sixth Amendment applicable to the States, speaks of denial of rights to 'any person,' not a denial of rights to 'any adult person.'" *Id.*, at 560 (dissenting opinion).

When the appellant here was denied the right to trial by jury, he was not even afforded the alternative available to an adult charged with the same offenses—trial before a judge not involved in the prosecutorial process. Juvenile Court judges, unlike the judges in the State's adult criminal courts, are responsible for the appointment and supervision of the prosecutorial staff responsible for proceeding against juveniles. The court assigns juvenile officers to receive complaints alleging delinquent conduct, directs what dispositional investigations the officers shall make, appoints the chief officer who then serves at the judge's pleasure, and controls through power of approval the appointment of all other prosecuting personnel.

The appellant was denied the right to jury trial and forced to trial before a judge with the duty of supervising the prosecutorial staff solely because he is a juvenile and subject to the jurisdiction of the Juvenile Courts. Since I continue to believe that "neither the Fourteenth Amendment nor the Bill of Rights is for adults alone," *In re Gault, supra*, at 13, I can find no justification for this discrimination in the treatment of juveniles charged with criminal conduct.

Certiorari Granted—Vacated and Remanded

No. 73–1396. MARCUS *v.* UNITED STATES. C. A. 1st Cir. Certiorari granted. Upon representation of the Solicitor General set forth in his memorandum for the United States filed May 31, 1974, judgment vacated and case remanded for further consideration in light of position presently asserted by the Government. Reported below: 491 F. 2d 901.

Miscellaneous Orders

No. ————. IN RE RESIGNATION OF DYE. Request of Stuart F. Dye, of Knoxville, Tennessee, that his name be stricken from the roll of attorneys admitted to practice in this Court granted.

No. A–1053. ANDERSON *v.* SOUTH CAROLINA. C. A. 4th Cir. Application for bail pending appeal presented to MR. JUSTICE DOUGLAS, and by him referred to the Court, denied.

No. A–1103 (73–1748). BISHOP ET AL. *v.* UNITED STATES. Application for stay of mandate of the United States Court of Appeals for the Eighth Circuit and for release pending disposition of petition for writ of certiorari, presented to MR. JUSTICE MARSHALL, and by him referred to the Court, denied. Reported below: 492 F. 2d 1361.

No. A–1120 (73–1742). TRAIN, ADMINISTRATOR, ENVIRONMENTAL PROTECTION AGENCY, ET AL. *v.* NATURAL RESOURCES DEFENSE COUNCIL, INC., ET AL. Application for stay of Part III of order of the United States Court of Appeals for the Fifth Circuit presented to MR. JUSTICE POWELL, and by him referred to the Court, granted pending final disposition of petition for writ of certiorari. MR. JUSTICE DOUGLAS dissents from granting stay. Reported below: 489 F. 2d 390.

No. A–1140. HART, A MINOR, BY HART, ET AL. *v.* COMMUNITY SCHOOL BOARD OF BROOKLYN, NEW YORK, SCHOOL DISTRICT 21, ET AL. Application to vacate order of the United States Court of Appeals for the Second Circuit and to reinstate judgment of the United States District Court for the Eastern District of New York, presented to MR. JUSTICE MARSHALL, and by him referred to the Court, denied.

No. A–1157. SEVERSON ET AL. *v.* ROEMER, COMMISSIONER OF TAXATION OF MINNESOTA, ET AL. Sup. Ct. Minn. Application for stay of implementation of Minnesota Tax Credit-Payment Act, Minn. Stat. §§ 290.086 and 290.087 (Supp. 1974), presented to MR. JUSTICE BLACKMUN, and by him referred to the Court, denied. MR. JUSTICE DOUGLAS would grant the stay.

No. 73–6033. ROE ET AL. *v.* NORTON, COMMISSIONER OF WELFARE. Appeal from D. C. Conn. [Probable jurisdiction noted, 415 U. S. 912.] Motion of children of appellants for leave to proceed further herein *in forma pauperis* granted.

No. 73–6589. SAYLES *v.* SIRICA, U. S. DISTRICT JUDGE, ET AL. Motion for leave to file petition for writ of mandamus and other relief denied.

Probable Jurisdiction Noted

No. 73–1573. WITHROW ET AL. *v.* LARKIN. Appeal from D. C. E. D. Wis. Probable jurisdiction noted. Reported below: 368 F. Supp. 796.

No. 73–1016. LASCARIS, COMMISSIONER, DEPARTMENT OF SOCIAL SERVICES OF ONONDAGA COUNTY *v.* SHIRLEY ET AL.; and

No. 73–1095. LAVINE, COMMISSIONER, DEPARTMENT OF SOCIAL SERVICES OF NEW YORK *v.* SHIRLEY ET AL. Ap-

peals from D. C. N. D. N. Y. Motion of appellee Stuck for leave to proceed *in forma pauperis* granted. Probable jurisdiction noted, cases consolidated, and a total of one hour allotted for oral argument. Reported below: 365 F. Supp. 818.

No. 73–1413. STAATS, COMPTROLLER GENERAL, ET AL. *v.* AMERICAN CIVIL LIBERTIES UNION, INC., ET AL. Appeal from D. C. D. C. Motion of National Association of Broadcasters for leave to file a brief as *amicus curiae* granted. Probable jurisdiction noted. Reported below: 366 F. Supp. 1041.

Certiorari Granted

No. 73–1380. CHEMEHUEVI TRIBE OF INDIANS ET AL. *v.* FEDERAL POWER COMMISSION ET AL.;

No. 73–1666. ARIZONA PUBLIC SERVICE CO. ET AL. *v.* CHEMEHUEVI TRIBE OF INDIANS ET AL.; and

No. 73–1667. FEDERAL POWER COMMISSION *v.* CHEMEHUEVI TRIBE OF INDIANS ET AL. C. A. D. C. Cir. Certiorari granted, cases consolidated, and a total of one hour allotted for oral argument. Reported below: 160 U. S. App. D. C. 83, 489 F. 2d 1207.

No. 73–1596. HAMPTON, CHAIRMAN, U. S. CIVIL SERVICE COMMISSION, ET AL. *v.* MOW SUN WONG ET AL. C. A. 9th Cir. Motion of respondents for leave to proceed *in forma pauperis* and certiorari granted. Reported below: 500 F. 2d 1031.

Certiorari Denied. (See also Nos. 73–1554, 73–1585, and 73–6271, *supra.*)

No. 73–1451. DILORENZO *v.* UNITED STATES;

No. 73–6361. SALLI *v.* UNITED STATES; and

No. 73–6377. RIZZO *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 492 F. 2d 443.

No. 73–1170. HAMILTON ET AL. *v.* UNITED STATES;
No. 73–6092. DEVILLE *v.* UNITED STATES;
No. 73–6154. PEREZ *v.* UNITED STATES;
No. 73–6197. PRUDHOMME *v.* UNITED STATES;
No. 73–6210. TRAHAM *v.* UNITED STATES;
No. 73–6464. LORIDANS *v.* UNITED STATES; and
No. 73–6498. TUNIS *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 489 F. 2d 51.

No. 73–1293. GOAD ET AL. *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 490 F. 2d 1158.

No. 73–1367. ADAM *v.* ELROD, SHERIFF. C. A. 7th Cir. Certiorari denied. Reported below: 489 F. 2d 758.

No. 73–1405. BAKER *v.* CALLAWAY, SECRETARY OF THE ARMY. C. A. 5th Cir. Certiorari denied. Reported below: 487 F. 2d 1401.

No. 73–1432. GEORATOR CORP. *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 485 F. 2d 283.

No. 73–1444. MILLER BOX, INC., ET AL. *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 488 F. 2d 695.

No. 73–1456. PRIDE ET UX. *v.* UNITED STATES ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 487 F. 2d 1403.

No. 73–1465. G. L. GIBBONS TRUCKING SERVICE, INC. *v.* NATIONAL LABOR RELATIONS BOARD. C. A. 9th Cir. Certiorari denied.

No. 73–1474. FERMONT DIVISION, DYNAMICS CORPORATION OF AMERICA *v.* UNITED STATES. Ct. Cl. Certiorari denied.

No. 73–1476. STEBBINS *v.* ALLSTATE INSURANCE COMPANIES ET AL. C. A. D. C. Cir. Certiorari denied. Reported below: 160 U. S. App. D. C. 403, 492 F. 2d 669.

No. 73–1485. CHOCTAW NATION ET AL. *v.* OKLAHOMA ET AL. C. A. 10th Cir. Certiorari denied. Reported below: 490 F. 2d 521.

No. 73–1502. COLON *v.* DIVISION OF HUMAN RIGHTS OF NEW YORK ET AL. C. A. 2d Cir. Certiorari denied.

No. 73–1518. GORDON ET UX. *v.* DU PONT GLORE, FORGAN, INC. C. A. 5th Cir. Certiorari denied. Reported below: 487 F. 2d 1260.

No. 73–1556. CULINARY ALLIANCE & BARTENDERS UNION LOCAL 703, AFL–CIO *v.* NATIONAL LABOR RELATIONS BOARD. C. A. 9th Cir. Certiorari denied. Reported below: 488 F. 2d 664.

No. 73–1564. WATERS ET AL. *v.* BENSINGER, CORRECTIONS DIRECTOR. C. A. 7th Cir. Certiorari denied. Reported below: 489 F. 2d 759.

No. 73–1566. TENNECO INC. ET AL. *v.* PUBLIC SERVICE COMMISSION OF WEST VIRGINIA ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 489 F. 2d 334.

No. 73–1569. GALEY CONSTRUCTION CO. ET AL. *v.* UTAH MORTGAGE LOAN CORP. C. A. 9th Cir. Certiorari denied.

No. 73–1572. ARIZONA *v.* WHITTINGHAM ET VIR. Ct. App. Ariz. Certiorari denied. Reported below: 19 Ariz. App. 27, 504 P. 2d 950.

No. 73–1580. WELLS *v.* HENNESSEY, JUDGE. Sup. Ct. Ohio. Certiorari denied. Reported below: 37 Ohio St. 2d 37, 306 N. E. 2d 421.

No. 73–1581. EKBERG SHIPPING CORP. *v.* MONCADA. C. A. 2d Cir. Certiorari denied. Reported below: 491 F. 2d 470.

No. 73–1586. ILLINOIS EDUCATION ASSN. ET AL. *v.* WALKER, GOVERNOR OF ILLINOIS, ET AL. Sup. Ct. Ill. Certiorari denied.

No. 73–1602. TIME OIL CO. *v.* WOLVERTON ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 491 F. 2d 361.

No. 73–1610. ROMANO ET AL. *v.* DEPARTMENT OF PUBLIC WORKS AND BUILDINGS OF ILLINOIS. Sup. Ct. Ill. Certiorari denied. Reported below: 56 Ill. 2d 121, 306 N. E. 2d 1.

No. 73–1634. CHICAGO, ROCK ISLAND & PACIFIC RAILROAD CO. *v.* PETERMAN. C. A. 8th Cir. Certiorari denied. Reported below: 493 F. 2d 88.

No. 73–1647. MOBIL CHEMICAL CORP. *v.* DEVERS. C. A. 5th Cir. Certiorari denied. Reported below: 488 F. 2d 258.

No. 73–1686. BLOOMFIELD-MESPO LOCAL SCHOOL DISTRICT ET AL. *v.* STATE BOARD OF EDUCATION. Ct. App. Ohio, Trumbull County. Certiorari denied.

No. 73–1711. NAPOLI *v.* NEW YORK ET AL. Ct. App. N. Y. Certiorari denied. Reported below: 33 N. Y. 2d 980, 309 N. E. 2d 137.

No. 73–5650. DOE ET AL. *v.* BURNS, COMMISSIONER, DEPARTMENT OF SOCIAL SERVICES OF IOWA, ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 479 F. 2d 646.

No. 73–6098. LYONS *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 487 F. 2d 1398.

No. 73–6109. MARTIN *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 489 F. 2d 674.

No. 73–6112. FOX *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 488 F. 2d 1093.

No. 73–6117. MCNALLY *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 491 F. 2d 751.

No. 73–6127. MOULDEN, AKA NELSON *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 487 F. 2d 1399.

No. 73–6131. TAYLOR *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 489 F. 2d 284.

No. 73–6137. GOODWIN *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 487 F. 2d 1400.

No. 73–6192. MERIWETHER *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 486 F. 2d 498.

No. 73–6209. GODFREY *v.* UNITED STATES. C. A. D. C. Cir. Certiorari denied. Reported below: 159 U. S. App. D. C. 343, 487 F. 2d 1214.

No. 73–6211. CHRISTMAN *v.* JOHNSON, CORRECTIONAL SUPERINTENDENT. C. A. 3d Cir. Certiorari denied.

No. 73–6281. FARMER *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 489 F. 2d 754.

No. 73–6323. JAYA-BALCAZAR ET AL. *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 490 F. 2d 1406.

No. 73–6364. DOBBS *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied.

No. 73–6381. BELL *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied.

No. 73–6385. NASIRIDDIN, AKA GILL *v.* UNITED STATES. C. A. D. C. Cir. Certiorari denied.

No. 73–6419. BLAKE *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 484 F. 2d 50.

No. 73–6434. BALLARD ET AL. *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 487 F. 2d 1403.

No. 73–6460. CARWELL *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 491 F. 2d 1334.

No. 73–6475. HARRIS *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 493 F. 2d 1213.

No. 73–6489. GONZALES *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 491 F. 2d 440.

No. 73–6497. BARBARISI *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied.

No. 73–6499. SEARS *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 490 F. 2d 150.

No. 73–6500. BROWN *v.* WAINWRIGHT, CORRECTIONS DIRECTOR. C. A. 5th Cir. Certiorari denied.

No. 73–6504. BUNNER *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 488 F. 2d 781.

No. 73–6505. KANDIS *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 491 F. 2d 713.

No. 73–6506. BRODY ET AL. *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 486 F. 2d 291.

No. 73–6537. STEWART *v.* PENNSYLVANIA. Sup. Ct. Pa. Certiorari denied. Reported below: 456 Pa. 447, 317 A. 2d 616.

No. 73–6562. PERRIN *v.* OREGON STATE BOARD OF HIGHER EDUCATION. Ct. App. Ore. Certiorari denied. Reported below: 15 Ore. App. 268, 515 P. 2d 409.

No. 73–6582. BERARD *v.* VERMONT. Sup. Ct. Vt. Certiorari denied. Reported below: 132 Vt. 138, 315 A. 2d 501.

No. 73–6584. LUCIEN *v.* ILLINOIS. App. Ct. Ill., 1st Dist. Certiorari denied. Reported below: 14 Ill. App. 3d 289, 302 N. E. 2d 371.

No. 73–6585. NICHOLS *v.* CLANON, PENITENTIARY SUPERINTENDENT. C. A. 9th Cir. Certiorari denied.

No. 73–6590. MCCOY ET AL. *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 488 F. 2d 761.

No. 73–6620. KING *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied.

No. 73–6644. JOHNSON *v.* COX, WARDEN. C. A. 6th Cir. Certiorari denied.

No. 73–6647. RANKIN *v.* OHIO. Sup. Ct. Ohio. Certiorari denied.

No. 73–6652. MCCROSSEN ET AL. *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied.

No. 73–6654. SANGSTER *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied.

No. 73–6688. KAPLAN *v.* ASSOCIATED-EAST MORTGAGE CO. Sup. Ct. N. J. Certiorari denied.

No. 73–1062. ROSNER *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied without prejudice for the United States District Court for the Southern District of New York to consider a motion for a new trial. Reported below: 485 F. 2d 1213.

No. 73–1315. MORNINGSIDE RENEWAL COUNCIL, INC., ET AL. *v.* UNITED STATES ATOMIC ENERGY COMMISSION ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 482 F. 2d 234.

MR. JUSTICE DOUGLAS, dissenting.

The Atomic Energy Commission's Safety and Licensing Appeal Board, reversing the decision of the Atomic Safety and Licensing Board, granted respondent Columbia University authorization to operate a Triga Mark II nuclear reactor on the university campus in Manhattan. Petitioners, who had intervened in the proceedings before the Commission, then brought a petition for review in the Court of Appeals. That court denied the petition and sustained the granting of the license in a split decision. 482 F. 2d 234. Petitioners claim that the Commission's failure to establish safety standards through rulemaking procedures requires reversal. They also contend that the agency's determination that no environmental impact statement was necessary* should be reversed under the proper standard of appellate review.

The Safety and Licensing Board had denied the license because it would not answer the questions raised about the reactor's possible effect on public health and safety without the benefit of general accident safety standards applicable to Triga reactors, but the Commission has never promulgated any such standards. Rather than proceeding through this rulemaking route the Commission has adjudicated safety questions on an individual, *ad hoc* basis, and the Commission's own licensing board found this procedure unsatisfactory:

> "The absence of applicable substantive criteria of the Commission and of convincing objective stand-

*An impact statement is required whenever there is a "major Federal action significantly affecting the quality of the human environment." 42 U. S. C. § 4332 (2) (C).

> ards of the regulatory staff . . . prompts the Licensing Board to decline answering the question of whether the health and safety of the public would be endangered upon the occurrence of a postulated accident to the applicant's reactor. The Licensing Board considers it inappropriate to enforce an answer derived from the narrow confines of a single proceeding and its own personal views about the degree to which the health and safety of the public ought to be protected against accident consequences."

The seeds of the present controversy were laid in *Power Reactor* v. *Electricians*, 367 U. S. 396, where we reversed a Court of Appeals holding that the Commission may not authorize the construction of a reactor near a large population center without "compelling reasons" for doing so, *id.*, at 414. There the Commission, "despite a report of its Advisory Committee on Reactor Safeguards, which was at best noncommittal about the probable safety of the proposed reactor in operation, issued a provisional construction permit without having held public hearings . . . ," *id.*, at 400, but our holding allowed the construction of the reactor to go forward. After the reactor was constructed and went into operation, an accident occurred on October 5, 1966. The reactor was shut down and has never been in regular operation since; it is currently being decommissioned. *In re Power Reactor Development Co.*, No. 50–16, Jan. 16, 1973 (Atomic Safety and Licensing Board); letter from Harold L. Price, Director of Regulation, to Sen. Philip A. Hart, Aug. 13, 1970.

Our decision in *Power Reactor* allowed construction to go forward with the principal inquiry into safety deferred until a subsequent application for a license to operate. "But when that point is reached, when millions have been invested, the momentum is on the side

of the applicant, not on the side of the public. The momentum is not only generated by the desire to salvage an investment. No agency wants to be the architect of a 'white elephant.'" *Power Reactor, supra,* at 417 (DOUGLAS, J., dissenting).

In regard to nuclear power generating plants, in fact, "conversion from construction permit to operating license has been automatic," Bronstein, The AEC Decision-Making Process and the Environment: a Case Study of the Calvert Cliffs Nuclear Power Plant, 1 Ecology L. Q. 689, 702 (1971). This may well be the problem lurking in the background here, as these petitioners were not on the scene to contest the issuance of the original construction permit for this reactor in 1963, and no judicial review was sought at that time. And in any event intervenors seeking to represent the public interest in an AEC construction permit contest have found themselves confronted with a "no-win" situation, in part because of "the fear or reluctance of qualified scientists and technicians to testify against a project recommended by the AEC." Like, Multi-Media Confrontation—The Environmentalists' Strategy for a "No-Win" Agency Proceeding, 1 Ecology L. Q. 495, 502 (1971).

This only goes to highlight the need here for the Commission to develop the relevant safety standards before passing on this application to authorize operation of a reactor in the midst of the Nation's largest metropolis.

The benefits of a rulemaking proceeding are clear; they give notice to affected persons and allow them to be heard, and the result is that "[a]gencies discover that they are not always repositories of ultimate wisdom; they learn from the suggestions of outsiders and often benefit from that advice." *NLRB* v. *Wyman-Gordon Co.*, 394 U. S. 759, 777–778 (DOUGLAS, J., dissenting).

The need would seem particularly great here because of the Commission's dual role as regulator and promoter of atomic energy. As Judge Oakes, dissenting below, pointed out: "The AEC . . . has an interest in seeing this reactor licensed to promote its Nuclear Education Training Program; to this end it has entered into an agreement with Columbia to provide post-license funds for the operation of the reactor and to waive charges for Commission-owned special nuclear material involved in its operation. My concern is so much the greater where, as here, the independent Safety and Licensing Board has denied the license, but was overruled by the three-member Appeal Board, consisting of two AEC staff members. Moreover, the safety tests relied upon by the Appeal Board here were conducted by the most interested party, the manufacturer of the reactor, following an exchange of correspondence between 'Ralph' (Mr. Peters of Gulf Oil) and 'Pete' (Dr. Peter A. Morris, Director of the AEC Division of Reactor Licensing) in which Gulf advised the Commission that 'We hope to have you or members of your staff participate fully in these experiments so that they will be deemed to have been done "under the auspices of the Regulatory Staff."' " 482 F. 2d, at 241.

For the same reasons it seems necessary to look more closely at the Commission's determination that no environmental impact statement need be prepared than did the court below, which was content to conclude that the agency's determination was not "arbitrary or capricious." Indeed there appears to be a conflict between the standard employed here by the Second Circuit and that employed by the Fifth Circuit in such cases as *Save Our Ten Acres* v. *Kreger,* 472 F. 2d 463, and *Hiram Clarke Civic Club, Inc.* v. *Lynn,* 476 F. 2d 421; the Fifth Circuit applies a more stringent standard of "reasonableness."

I would grant the petition for certiorari, both to resolve this conflict and to consider the propriety of the agency's

practice of licensing Triga reactors in the absence of rules establishing safety standards.

No. 73–1320. BOWMAN *v.* FLORIDA. Dist. Ct. App. Fla., 1st Dist. Stay of mandate of the Supreme Court of Florida and continuance of bond heretofore granted by MR. JUSTICE POWELL on January 17, 1974, vacated. Certiorari denied. Reported below: 281 So. 2d 35 and 286 So. 2d 9.

No. 73–1369. COCA COLA BOTTLING COMPANY OF NEW YORK, INC. *v.* PALMAROZZO. C. A. 2d Cir. Certiorari denied. MR. JUSTICE STEWART took no part in the consideration or decision of this petition. Reported below: 490 F. 2d 586.

No. 73–1410. THOMAS, SHERIFF *v.* BEASLEY. C. A. 6th Cir. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 491 F. 2d 507.

No. 73–1571. NEW JERSEY DEPARTMENT OF INSTITUTIONS AND AGENCIES, DIVISION OF PUBLIC WELFARE, ET AL. *v.* HAUSMAN. Sup. Ct. N. J. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 64 N. J. 202, 314 A. 2d 362.

No. 73–1590. DYNEX INDUSTRIAL PLASTICS CORP. *v.* ANCHOR PLASTICS CO., INC. C. A. 3d Cir. Certiorari denied. MR. JUSTICE DOUGLAS would grant certiorari. Reported below: 492 F. 2d 1238.

No. 73–1600. BAKER ET AL., TRUSTEES *v.* GÖTZ ET AL. C. A. 3d Cir. Certiorari denied. MR. JUSTICE DOUGLAS would grant certiorari.

No. 73–6130. CAUGHMAN *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. MR. JUSTICE DOUGLAS would grant certiorari. Reported below: 483 F. 2d 1401.

No. 73–6173. PLAZOLA ET AL. *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. MR. JUSTICE DOUGLAS would grant certiorari. Reported below: See 487 F. 2d 157.

No. 73–6487. MARTINEZ-MARTINEZ *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied. MR. JUSTICE DOUGLAS would grant certiorari.

No. 73–6340. TIJERINA *v.* NEW MEXICO. Sup. Ct. N. M. Certiorari denied. THE CHIEF JUSTICE took no part in the consideration or decision of this petition. Reported below: 86 N. M. 31, 519 P. 2d 127.

MR. JUSTICE BRENNAN, with whom MR. JUSTICE DOUGLAS and MR. JUSTICE MARSHALL join, dissenting.

Petitioner's participation in a serious disturbance at the courthouse in Tierra Amarilla, New Mexico, on June 5, 1967, resulted in his being charged with having both kidnaped and falsely imprisoned a deputy sheriff, as well as having assaulted the courthouse and jail. After a jury trial, he was acquitted of all charges. Subsequently, over petitioner's objection that his double jeopardy protections were being violated, he was tried on charges of having assaulted three persons with intent to commit violent felonies, as well as having falsely imprisoned another deputy sheriff, all of which arose out of the same incident on June 5, 1967. Petitioner was convicted on one of the assault charges and on the false imprisonment charge. The Court of Appeals of New Mexico certified petitioner's appeal to the New Mexico Supreme Court, 84 N. M. 432, 504 P. 2d 642 (1972), and the Supreme Court affirmed the convictions. 86 N. M. 31, 519 P. 2d 127 (1973).

Although all of the charges leveled against petitioner at the two trials arose out of the same transaction or episode, they were prosecuted by the State in separate proceedings. That, in my opinion,

requires that we grant the petition for certiorari and reverse, for I adhere to the view that the Double Jeopardy Clause of the Fifth Amendment, which is applicable to the States through the Fourteenth Amendment, *Benton* v. *Maryland,* 395 U. S. 784 (1969), requires the prosecution, except in extremely limited circumstances not present here, "to join at one trial all the charges against a defendant that grow out of a single criminal act, occurrence, episode, or transaction." *Ashe* v. *Swenson,* 397 U. S. 436, 453–454 (1970) (BRENNAN, J., concurring); see *Smith* v. *Missouri,* 414 U. S. 1031 (1973) (BRENNAN, J., dissenting); *Miller* v. *Oregon,* 405 U. S. 1047 (1972) (BRENNAN, J., dissenting); *Harris* v. *Washington,* 404 U. S. 55, 57 (1971) (statement of DOUGLAS, BRENNAN, and MARSHALL, JJ.); *Waller* v. *Florida,* 397 U. S. 387, 395 (1970) (BRENNAN, J., concurring). See also *People* v. *White,* 390 Mich. 245, 212 N. W. 2d 222 (1973); *State* v. *Brown,* 262 Ore. 442, 497 P. 2d 1191 (1972); *Commonwealth* v. *Campana,* 452 Pa. 233, 304 A. 2d 432, vacated and remanded, 414 U. S. 808 (1973), adhered to on remand, 455 Pa. 622, 314 A. 2d 854 (1974).

No. 73–6350. MOTON *v.* SWENSON, WARDEN. C. A. 8th Cir. Certiorari denied. Reported below: 488 F. 2d 1060.

MR. JUSTICE BRENNAN, with whom MR. JUSTICE DOUGLAS and MR. JUSTICE MARSHALL join, dissenting.

Petitioner and a companion entered a gas station in St. Louis, Missouri. While his companion held two station attendants at gunpoint, petitioner demanded and obtained money from one attendant; his companion demanded and obtained money from the second. Petitioner was charged in an information with aiding and abetting his companion in the robbery of the second attendant, tried and convicted by a jury in the Circuit Court of the city of St. Louis of robbery in the first

degree by means of a dangerous and deadly weapon, and sentenced to 12 years' imprisonment. Subsequently, petitioner was charged in a separate information with the robbery of the other attendant. He was again tried in the Circuit Court of the city of St. Louis, found guilty of robbery in the first degree by means of a dangerous and deadly weapon, and sentenced to 15 years' imprisonment. In a consolidated appeal, the Supreme Court of Missouri affirmed both convictions. 476 S. W. 2d 785 (1972). Petitioner then sought a writ of habeas corpus in the United States District Court for the Eastern District of Missouri. The District Court, in an unreported decision, dismissed the petition, rejecting the claim that the second prosecution violated petitioner's constitutional protection against double jeopardy. The Court of Appeals for the Eighth Circuit affirmed the dismissal. 488 F. 2d 1060 (1973).

Although both robbery charges clearly arose out of the same transaction or episode, they were prosecuted by the State in separate proceedings. That, in my opinion, requires that we grant the petition for certiorari and reverse, for I adhere to the view that the Double Jeopardy Clause of the Fifth Amendment, which is applicable to the States through the Fourteenth Amendment, *Benton* v. *Maryland*, 395 U. S. 784 (1969), requires the prosecution, except in extremely limited circumstances not present here, "to join at one trial all the charges against a defendant that grow out of a single criminal act, occurrence, episode, or transaction." *Ashe* v. *Swenson*, 397 U. S. 436, 453–454 (1970) (BRENNAN, J., concurring); see *Smith* v. *Missouri*, 414 U. S. 1031 (1973) (BRENNAN, J., dissenting); *Miller* v. *Oregon*, 405 U. S. 1047 (1972) (BRENNAN, J., dissenting); *Harris* v. *Washington*, 404 U. S. 55, 57 (1971) (statement of DOUGLAS, BRENNAN, and MARSHALL, JJ.); *Waller* v. *Florida*, 397

U. S. 387, 395 (1970) (BRENNAN, J., concurring). See also *People* v. *White*, 390 Mich. 245, 212 N. W. 2d 222 (1973); *State* v. *Brown*, 262 Ore. 442, 497 P. 2d 1191 (1972); *Commonwealth* v. *Campana*, 452 Pa. 233, 304 A. 2d 432, vacated and remanded, 414 U. S. 808 (1973), adhered to on remand, 455 Pa. 622, 314 A. 2d 854 (1974).

Rehearing Denied

No. 73–716. GARNER *v.* UNITED STATES, 416 U. S. 935;

No. 73–853. FORBICETTA *v.* UNITED STATES, 416 U. S. 993;

No. 73–1104. HOOPA VALLEY TRIBE *v.* SHORT ET AL., 416 U. S. 961;

No. 73–1382. KLEMMER *v.* ALABAMA, 416 U. S. 957;

No. 73–1421. SMITH *v.* ILLINOIS CENTRAL RAILROAD CO. ET AL., 416 U. S. 985;

No. 73–5876. LUFKINS *v.* UNITED STATES, 416 U. S. 971;

No. 73–6054. COLE ET AL. *v.* CALIFORNIA, 416 U. S. 964;

No. 73–6055. COLE ET AL. *v.* CALIFORNIA, 416 U. S. 972;

No. 73–6145. MORGAN *v.* CALIFORNIA STATE PERSONNEL BOARD ET AL., 416 U. S. 972;

No. 73–6250. SMITH *v.* TWOMEY, WARDEN, 416 U. S. 994;

No. 73–6404. SMITH *v.* ASKINS, 416 U. S. 964; and

No. 73–6448. STARKEY *v.* WYRICK, WARDEN, 416 U. S. 992. Petitions for rehearing denied.

JUNE 13, 1974

Dismissal Under Rule 60

No. 32, Orig. MISSOURI *v.* NEBRASKA. Bill of complaint dismissed under Rule 60 of the Rules of this Court. [For earlier orders herein, see, *e. g.*, *ante*, p. 904.]

JUNE 15, 1974

Certiorari Granted

No. 73–1834. NIXON, PRESIDENT OF THE UNITED STATES *v.* UNITED STATES. Petition for certiorari before judgment to C. A. D. C. Cir. Certiorari granted and case consolidated with No. 73–1766 [*United States* v. *Nixon, President of the United States*, certiorari granted, *ante*, p. 927]. Parties shall exchange and file briefs by 1 p. m. on June 21, 1974, and any responsive briefs shall be filed by July 1, 1974. Oral argument set for July 8, 1974, at 10 a.m. MR. JUSTICE REHNQUIST took no part in the consideration or decision of this petition.

Miscellaneous Order

No. 73–1766. UNITED STATES *v.* NIXON, PRESIDENT OF THE UNITED STATES, ET AL.; and

No. 73–1834. NIXON, PRESIDENT OF THE UNITED STATES *v.* UNITED STATES. Petitions for certiorari before judgment to C. A. D. C. Cir.

1. Joint motion of the Special Prosecutor and counsel for the President to unseal those portions of the record ordered sealed by the District Court on May 13, 1974, denied except for the following extract from the sealed record:

"On February 25, 1974, in the course of its consideration of the indictment in the instant case, the June 5, 1972, Grand Jury, by a vote of 19–0, determined that there is probable cause to believe that Richard M. Nixon (among others) was a member of the conspiracy to defraud the United States and to obstruct justice charged in Count I of the instant indictment, and the Grand Jury authorized the Special Prosecutor to identify Richard M. Nixon (among others) as an unindicted coconspirator in connection with subsequent legal proceedings in this case."

Other than this disclosure, the sealed record shall remain sealed.

2. In addition to questions designated by the parties in the petition for certiorari, the cross-petition for certiorari, and the petition for writ of mandamus filed in the Court of Appeals (CA No. 74–1532), the parties are requested to brief and argue the following questions:

(a) Is the District Court order of May 20, 1974, an appealable order?

(b) Does this Court have jurisdiction to entertain and decide the petition for mandamus transmitted by the Court of Appeals to this Court?

3. Printing of any portions of the record that have been filed in this Court under seal shall be dispensed with. Any portions of the briefs that counsel deem necessary to keep confidential in order to conform with the provisions of paragraph 1 above shall be submitted under seal to this Court, and counsel in oral argument shall refrain from disclosing any portions of the record that are under seal.

MR. JUSTICE REHNQUIST took no part in the consideration or decision of this order.

JUNE 17, 1974

Affirmed on Appeal

No. 73–120. MARBURGER, COMMISSIONER OF EDUCATION OF NEW JERSEY, ET AL. *v.* PUBLIC FUNDS FOR PUBLIC SCHOOLS OF NEW JERSEY ET AL.; and

No. 73–121. GRIGGS ET AL. *v.* PUBLIC FUNDS FOR PUBLIC SCHOOLS OF NEW JERSEY ET AL. Appeals from D. C. N. J. Motion of EDL-New Jersey, Inc., for leave to file a brief as *amicus curiae* in No. 73–120 granted. Judgment affirmed. THE CHIEF JUSTICE, MR. JUSTICE WHITE, and MR. JUSTICE REHNQUIST would note probable juris-

diction and set cases for oral argument. Reported below: 358 F. Supp. 29.

Appeals Dismissed

No. 73–1321. OHLEY *v.* ILLINOIS. Appeal from App. Ct. Ill., 5th Dist., dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied. Reported below: 15 Ill. App. 3d 125, 303 N. E. 2d 761.

No. 73–1440. MCBRYDE SUGAR CO., LTD., ET AL. *v.* HAWAII ET AL. Appeal from Sup. Ct. Hawaii dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied. Reported below: 54 Haw. 174, 504 P. 2d 1330.

No. 73–1570. DOWELL ET UX. *v.* UTAH. Appeal from Sup. Ct. Utah dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied. Reported below: 30 Utah 323, 517 P. 2d 1016.

No. 73–1386. CHICAGO WELFARE RIGHTS ORGANIZATION ET AL. *v.* EDELMAN, DIRECTOR, DEPARTMENT OF PUBLIC AID OF ILLINOIS, ET AL. Appeal from Sup. Ct. Ill. dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari denied. MR. JUSTICE DOUGLAS would note probable jurisdiction and set case for oral argument. Reported below: 56 Ill. 2d 33, 305 N. E. 2d 140.

No. 73–1606. MURPHY NURSING HOME, INC., ET AL. *v.* RATE SETTING COMMISSION ET AL. Appeal from Sup. Jud. Ct. Mass. dismissed for want of substantial federal question. Reported below: —— Mass. ——, 305 N. E. 2d 837.

No. 73–1623. MALITO ET AL. *v.* MARCIN ET AL. Appeal from App. Ct. Ill., 1st Dist., dismissed for want of substantial federal question. Reported below: 14 Ill. App. 3d 658, 303 N. E. 2d 262.

No. 73–6621. SCHOOS *v.* ILLINOIS. Appeal from App. Ct. Ill., 1st Dist., dismissed for want of substantial federal question. Reported below: 15 Ill. App. 3d 964, 305 N. E. 2d 560.

No. 73–1609. RUBENSTEIN ET AL. *v.* TOWNSHIP OF CHERRY HILL ET AL. Appeal from Sup. Ct. N. J. dismissed for want of substantial federal question. MR. JUSTICE DOUGLAS would note probable jurisdiction and set case for oral argument.

Vacated and Remanded on Appeal

No. 73–1436. DANIEL ET AL. *v.* WATERS ET AL. Appeal from D. C. M. D. Tenn. Judgment vacated and case remanded to the District Court so that it may enter a fresh judgment from which a timely appeal may be taken to the Court of Appeals.

No. 73–6353. WEBSTER, A MINOR, BY WEBSTER, ET AL. *v.* PERRY, CHAIRMAN, BOARD OF EDUCATION OF WINSTON-SALEM/FORSYTH COUNTY SCHOOL SYSTEM, ET AL. Appeal from D. C. W. D. N. C. Judgment vacated and case remanded to the District Court so that it may enter a fresh judgment from which a timely appeal may be taken to the Court of Appeals. Reported below: 367 F. Supp. 666.

Certiorari Granted—Vacated and Remanded

No. 73–1516. GLOVER ET AL. *v.* MCMURRAY, COMMISSIONER, AGENCY FOR CHILD DEVELOPMENT OF THE CITY OF NEW YORK, ET AL. C. A. 2d Cir. Certiorari granted, judgment vacated, and case remanded for further con-

sideration in light of *Hagans* v. *Lavine,* 415 U. S. 528 (1974). Reported below: 487 F. 2d 403.

No. 73–966. SHELL OIL CO. *v.* PUBLIC SERVICE COMMISSION OF NEW YORK ET AL.;

No. 73–967. MOBIL OIL CORP. *v.* FEDERAL POWER COMMISSION;

No. 73–968. FEDERAL POWER COMMISSION *v.* PUBLIC SERVICE COMMISSION OF NEW YORK; and

No. 73–969. UNITED DISTRIBUTION COMPANIES *v.* PUBLIC SERVICE COMMISSION OF NEW YORK. C. A. D. C. Cir. Certiorari granted, judgment vacated, and cases remanded for further consideration in light of *Mobil Oil Corp.* v. *Federal Power Commission, ante,* p. 283. MR. JUSTICE STEWART and MR. JUSTICE POWELL took no part in the consideration or decisions of these cases. Reported below: 159 U. S. App. D. C. 172, 487 F. 2d 1043.

No. 73–1399. PENNSYLVANIA *v.* ROMBERGER. Sup. Ct. Pa. Motion of respondent for leave to proceed *in forma pauperis* and certiorari granted. Judgment vacated and case remanded for further consideration in light of *Michigan* v. *Tucker, ante,* p. 433.

Miscellaneous Orders

No. A–1175. TRAIN, ADMINISTRATOR, ENVIRONMENTAL PROTECTION AGENCY *v.* TEXAS ET AL. Application for stay of orders of the United States District Court for the Western District of Texas pending appeal in the United States Court of Appeals for the Fifth Circuit presented to MR. JUSTICE POWELL, and by him referred to the Court, granted.

No. A–1179. COWN ET AL. *v.* VANDERHOOF, GOVERNOR OF COLORADO. Application for writ of habeas corpus or in the alternative to transfer the cause to the appropriate United States District Court for a hearing (28 U. S. C.

§ 2241 (b)) presented to MR. JUSTICE WHITE, and by him referred to the Court, denied.

No. A–1185 (73–1838). CRISLER, COMMISSIONER OF PUBLIC SAFETY OF MISSISSIPPI, ET AL. *v.* MORROW ET AL. Application for recall and stay of the mandate of the United States Court of Appeals for the Fifth Circuit presented to MR. JUSTICE POWELL, and by him referred to the Court, denied. Reported below: 491 F. 2d 1053.

No. D–23. IN RE DISBARMENT OF LEE. It having been reported to the Court that Clifford Taylor Lee, of Washington, D. C., has been disbarred from the practice of law by the United States Court of Appeals for the District of Columbia Circuit, and this Court by order of March 18, 1974 [415 U. S. 972], having suspended the said Clifford Taylor Lee from the practice of law in this Court and directed that a rule issue requiring him to show cause why he should not be disbarred;

And it appearing that the said rule was duly issued and served upon the respondent, and that the time within which to file a return has expired;

It is ordered that the said Clifford Taylor Lee be, and he is hereby, disbarred from the practice of law in this Court and that his name be stricken from the roll of attorneys admitted to practice before the Bar of this Court.

No. 73–1626. WEAVER, DIRECTOR, DEPARTMENT OF PUBLIC AID OF ILLINOIS, ET AL. *v.* RANDLE ET AL. Appeal from D. C. N. D. Ill. The Solicitor General is invited to file a brief expressing the views of the United States.

No. 73–6618. SELLERS *v.* ESTELLE, CORRECTIONS DIRECTOR;

No. 73–6708. POVEY *v.* WARDEN, NEVADA STATE PRISON; and

No. 73–6767. DOGGETT *v.* NEVADA ET AL. Motions for leave to file petitions for writs of habeas corpus denied.

No. 73–6566. PROFFITT *v.* TUCKER, CLERK, U. S. COURT OF APPEALS, ET AL.; and

No. 73–6597. CARTER *v.* ESTELLE, CORRECTIONS DIRECTOR, ET AL. Motions for leave to file petitions for writs of habeas corpus and other relief denied.

No. 73–6524. CARTER *v.* UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT;

No. 73–6608. REIERSON *v.* PROCUNIER, CORRECTIONS DIRECTOR, ET AL.; and

No. 73–6619. HUNTER *v.* APPELLATE COURT OF ILLINOIS, FIRST DISTRICT, FOURTH DIVISION, ET AL. Motions for leave to file petitions for writs of mandamus denied.

No. 73–6277. CASTLE *v.* UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT. Motion for leave to file petition for writ of mandamus denied. MR. JUSTICE DOUGLAS would grant the motion.

No. 73–6613. PARKER *v.* UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT. Motion for leave to file petition for writ of mandamus denied. THE CHIEF JUSTICE took no part in the consideration or decision of this motion.

Probable Jurisdiction Noted

No. 73–717. ANTOINE ET UX. *v.* WASHINGTON. Appeal from Sup. Ct. Wash. Probable jurisdiction noted. Reported below: 82 Wash. 2d 440, 511 P. 2d 1351.

No. 73–1595. COLONIAL PIPELINE CO. *v.* AGERTON, COLLECTOR OF REVENUE OF LOUISIANA. Appeal from Sup. Ct. La. Probable jurisdiction noted. Reported below: 289 So. 2d 93.

No. 73–1697. STANDARD PRESSED STEEL CO. *v.* DEPARTMENT OF REVENUE OF WASHINGTON. Appeal from Ct. App. Wash. Probable jurisdiction noted. Reported below: 10 Wash. App. 45, 516 P. 2d 1043.

Certiorari Granted

No. 73–820. UNITED STATES *v.* GUANA-SANCHEZ. C. A. 7th Cir. Motion of respondent for leave to proceed *in forma pauperis* and certiorari granted. Reported below: 484 F. 2d 590.

No. 73–1627. LEFKOWITZ, ATTORNEY GENERAL OF NEW YORK *v.* NEWSOME. C. A. 2d Cir. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari granted limited to Question 1 presented by the petition, which reads as follows: "Does a state defendant's plea of guilty waive federal habeas corpus review of his conviction, even though under state law he has been permitted review in the state appellate courts of the denial of his motion, on constitutional grounds, to suppress the evidence that would have been offered against him had there been a trial?" Reported below: 492 F. 2d 1166.

No. 73–5993. TEST *v.* UNITED STATES. C. A. 10th Cir. Motion for leave to proceed *in forma pauperis* granted. Certiorari granted limited to Question 1 presented by the petition, which reads as follows: "Does the Jury Selection and Service Act of 1968, 28 U. S. C. § 1861 *et seq.*, require that a defendant be provided access to jury lists and other jury records upon the filing of a sworn statement in compliance with 28 U. S. C. § 1867 (d) in support of a motion to quash the jury and upon the presentation of a prima facie claim of constitutional dimension, i. e., the systematic exclusion of Mexican-Americans from the jury array?" Reported below: 486 F. 2d 922.

Certiorari Denied. (See also Nos. 73–1321, 73–1440, 73–1570, and 73–1386, *supra.*)

No. 73–1351. ANGEL ET AL. *v.* BUTZ, SECRETARY OF

AGRICULTURE. C. A. 10th Cir. Certiorari denied. Reported below: 487 F. 2d 260.

No. 73–1360. BRAMSON ET AL. *v.* BUTZ, SECRETARY OF AGRICULTURE, ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 485 F. 2d 1125.

No. 73–1375. CALIFORNIA HIGHWAY COMMISSION ET AL. *v.* LA RAZA UNIDA OF SOUTHERN ALAMEDA COUNTY ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 488 F. 2d 559.

No. 73–1466. HOPKINSON ET AL. *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied. Reported below: 492 F. 2d 1041.

No. 73–1478. SANTELISES *v.* IMMIGRATION AND NATURALIZATION SERVICE. C. A. 2d Cir. Certiorari denied. Reported below: 491 F. 2d 1254.

No. 73–1487. DeMICHELE ET UX. *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 2d Cir. Certiorari denied. Reported below: 489 F. 2d 752.

No. 73–1492. GILL ET AL. *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 490 F. 2d 233.

No. 73–1515. SCHAEF ET AL. *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied.

No. 73–1563. GRANT *v.* TEXAS. Ct. Crim. App. Tex. Certiorari denied. Reported below: 505 S. W. 2d 279.

No. 73–1587. SWAFFORD *v.* ZINNAMON ASSOCIATES ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 487 F. 2d 1400 and 488 F. 2d 863.

No. 73–1591. RODWAY *v.* AMOCO SHIPPING CO. ET AL. C. A. 1st Cir. Certiorari denied. Reported below: 491 F. 2d 265.

No. 73–1592. NICKELLS ET AL. *v.* WASHINGTON. Ct. App. Wash. Certiorari denied. Reported below: 9 Wash. App. 1017.

No. 73–1598. PENNSYLVANIA *v.* CAMPANA ET AL. Sup. Ct. Pa. Certiorari denied. Reported below: 455 Pa. 622, 314 A. 2d 854.

No. 73–1601. CHRISTENSEN *v.* BOARD OF EDUCATION OF TOWNSHIP HIGH SCHOOL DISTRICT No. 203 ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 489 F. 2d 758.

No. 73–1608. THIBADEAU *v.* HENLEY. C. A. 5th Cir. Certiorari denied. Reported below: 489 F. 2d 1311.

No. 73–1618. DAVENPORT *v.* ALTMAN ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 492 F. 2d 1237.

No. 73–1620. BROWN *v.* HOUSTON INDEPENDENT SCHOOL DISTRICT ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 486 F. 2d 137.

No. 73–1622. ST. LOUIS-SAN FRANCISCO RAILWAY CO. *v.* ARMCO STEEL CORP. ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 490 F. 2d 367.

No. 73–1628. OIL, CHEMICAL & ATOMIC WORKERS INTERNATIONAL UNION, AFL-CIO, ET AL. *v.* AMERICAN MAIZE-PRODUCTS CO. C. A. 7th Cir. Certiorari denied. Reported below: 492 F. 2d 409.

No. 73–1629. SCHEELHAASE *v.* WOODBURY CENTRAL COMMUNITY SCHOOL DISTRICT ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 488 F. 2d 237.

No. 73–1630. TRALICK *v.* PARK CHEMICAL CO. ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 492 F. 2d 1244.

No. 73–1640. WORLEY *v.* COLUMBIA GAS OF KENTUCKY, INC., ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 491 F. 2d 256.

No. 73–5642. THOMAS *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied.

No. 73–6165. HOULE *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 490 F. 2d 167.

No. 73–6175. JONES *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 491 F. 2d 526 and 529.

No. 73–6201. PEDERSON *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied.

No. 73–6397. SIMS *v.* UTAH. Sup. Ct. Utah. Certiorari denied. Reported below: 30 Utah 2d 251 and 357, 516 P. 2d 354 and 517 P. 2d 1315.

No. 73–6399. MASELLI *v.* MANCUSI, CORRECTIONAL SUPERINTENDENT. C. A. 2d Cir. Certiorari denied. Reported below: 485 F. 2d 677.

No. 73–6427. COOKSEY, AKA MONTAGUE *v.* UNITED STATES. C. A. D. C. Cir. Certiorari denied. Reported below: 159 U. S. App. D. C. 55, 486 F. 2d 1315.

No. 73–6432. DEHERRERA *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 492 F. 2d 265.

No. 73–6451. TEPLITSKY *v.* BUREAU OF EMPLOYEES' COMPENSATION, U. S. DEPARTMENT OF LABOR. C. A. 2d Cir. Certiorari denied.

No. 73–6508. BARRIGA-COVARRUBIAS *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied.

No. 73–6509. SUAREZ *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied.

No. 73–6511. TASBY *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied.

No. 73–6512. MCGHEE *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 488 F. 2d 781.

No. 73–6514. TRANQUILLI *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 491 F. 2d 1272.

No. 73–6516. FEATHERSTON *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 491 F. 2d 96.

No. 73–6520. OWENS *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied.

No. 73–6523. BAGLEY *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 493 F. 2d 1401.

No. 73–6530. MYERS *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 490 F. 2d 991.

No. 73–6531. JOHNSON *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied.

No. 73–6532. ADAMS *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 492 F. 2d 1246.

No. 73–6533. FRAZIER *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied.

No. 73–6538. KENDRICKS *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 488 F. 2d 781.

No. 73–6540. BECKWITH *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 492 F. 2d 1237.

No. 73–6543. JAIME-BARRIOS *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 494 F. 2d 455.

No. 73–6602. SANDERS *v.* ILLINOIS. Sup. Ct. Ill. Certiorari denied. Reported below: 56 Ill. 2d 241, 306 N. E. 2d 865.

No. 73–6603. AGEE *v.* HICKMAN ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 490 F. 2d 210.

No. 73–6615. LANE *v.* KERN, SHERIFF. C. A. 5th Cir. Certiorari denied. Reported below: 488 F. 2d 978.

No. 73–6626. NAVARRO *v.* TEXAS. Ct. Crim. App. Tex. Certiorari denied.

No. 73–6627. MCPHERSON *v.* MICHIGAN. Ct. App. Mich. Certiorari denied. Reported below: 38 Mich. App. 534, 197 N. W. 2d 173.

No. 73–6630. GREEN *v.* ILLINOIS. App. Ct. Ill., 1st Dist. Certiorari denied. Reported below: 14 Ill. App. 3d 972, 304 N. E. 2d 32.

No. 73–6637. HERRON *v.* MISSISSIPPI. Sup. Ct. Miss. Certiorari denied. Reported below: 287 So. 2d 759.

No. 73–6641. ALVES ET UX. *v.* QUEEN'S MEDICAL CENTER ET AL. Sup. Ct. Hawaii. Certiorari denied.

No. 73–6645. WALKER *v.* HENDERSON, CORRECTIONAL SUPERINTENDENT. C. A. 2d Cir. Certiorari denied. Reported below: 492 F. 2d 1311.

No. 73–6646. BYRD *v.* ILLINOIS. App. Ct. Ill., 1st Dist. Certiorari denied. Reported below: 15 Ill. App. 3d 556, 304 N. E. 2d 671.

No. 73–6649. CARROLL *v.* ILLINOIS. App. Ct. Ill., 1st Dist. Certiorari denied. Reported below: 12 Ill. App. 3d 869, 299 N. E. 2d 134.

No. 73–6653. BARTOS *v.* BRIGHAM YOUNG UNIVERSITY ET AL. C. A. 9th Cir. Certiorari denied.

No. 73–438. MOBIL OIL CORP. *v.* FEDERAL POWER COMMISSION. C. A. 5th Cir. Certiorari denied. MR. JUSTICE STEWART and MR. JUSTICE POWELL took no part in the consideration or decision of this petition. Reported below: 484 F. 2d 469.

No. 73–1174. NORTH CAROLINA *v.* WRENN. C. A. 4th Cir. Certiorari denied. Reported below: 486 F. 2d 1399.

MR. JUSTICE WHITE, with whom THE CHIEF JUSTICE joins, dissenting from the denial of certiorari.

Respondent was convicted in a North Carolina state court of a narcotics violation. Evidence used against him at trial was seized under a search warrant issued by a magistrate on an affidavit which was sustained at trial after an evidentiary hearing out of the presence of a jury. The conviction was affirmed on direct appeal, and this Court denied certiorari, 405 U. S. 1064 (1972), but the conviction was invalidated by the United States District Court when it granted respondent's petition for a writ of habeas corpus. The District Court took no further evidence and was "in complete agreement with the conclusion reached [by the state court] that on the face of it the affidavit supporting the issuance of the search warrant satisfied the provisions of the [applicable North Carolina] statute and was constitutionally adequate." But after examining the state court record of the suppression hearing, the District Court issued the writ. Saying that the "majority rule in the state courts seems to preclude impeachment of the factual averments in the affidavit"; that North Carolina appeared to follow that rule; and that the question had not been finally settled by this Court, see *Rugendorf* v. *United*

States, 376 U. S. 528, 531–532 (1964), the District Court nevertheless was of the view that it should not hesitate "to rule out the erroneous averments in the affidavit and proceed to test the validity of the warrant in the light of the remaining uncontested averments." When so tested, the affidavit was found insufficient. The court also ruled that the officer who made the affidavit could not rehabilitate the warrant by sworn testimony at the suppression hearing as to facts which were known when the warrant issued and which would have been sufficient cause for issuance of the warrant had they been included in the affidavit. This was true even though these additional facts had actually been presented to the magistrate, for the supplemental information had not been sworn.

The Court of Appeals affirmed *per curiam*, approving the District Court's review of the search warrant affidavit in light of the affiant's testimony in the state court hearing. This ruling is consistent with prior law of the Circuit permitting subsequent impeachment of a warrant affidavit. *King* v. *United States*, 282 F. 2d 398 (CA4 1960). Other federal courts are in apparent agreement, *e. g.*, *United States* v. *Dunnings*, 425 F. 2d 836 (CA2 1969), cert. denied, 397 U. S. 1002 (1970); *United States* v. *Upshaw*, 448 F. 2d 1218, 1220–1222 (CA5 1971), cert. denied, 405 U. S. 934 (1972); *United States* v. *Roth*, 391 F. 2d 507 (CA7 1967). Still other cases in other circuits, mostly older ones, but apparently still of precedential importance, have announced a different rule. *E. g.*, *Kenney* v. *United States*, 81 U. S. App. D. C. 259, 157 F. 2d 442 (1946); *Gracie* v. *United States*, 15 F. 2d 644 (CA1 1926), cert. denied, 273 U. S. 748 (1927); *Schiller* v. *United States*, 35 F. 2d 865 (CA9 1929). But see *United States* v. *Thornton*, 147 U. S. App. D. C. 114, 454 F. 2d 957, 966–967 (1971); *United States* v. *Wong*, 470 F. 2d 129, 132 (CA9 1972). The issue is current and is

obviously not simple. See *United States* v. *Upshaw*, *supra*, at 1221 n. 3.

Of equal or perhaps even greater importance in the context of this grant of federal habeas relief to a state prisoner is the conflict between the decision of the Court of Appeals and the rule followed in a majority of state court decisions considering the issue precluding challenges to the truthfulness of the factual statements contained in a warrant affidavit at a hearing subsequent to the issuance of the warrant.* Indeed, the District Court speculated in this case that the North Carolina courts may have followed the majority rule in the other States on respondent's direct appeal, and there is some indication that North Carolina is in accord with the majority

*At least 15 States appear to prohibit subsequent impeachment of the affidavit supporting a warrant. *Liberto* v. *State*, 248 Ark. 350, 451 S. W. 2d 464 (1970) (alternative holding); *State* v. *Anonymous*, 30 Conn. Supp. 211, 309 A. 2d 135 (1973); *People* v. *Stansberry*, 47 Ill. 2d 541, 268 N. E. 2d 431, cert. denied, 404 U. S. 873 (1971); *Seager* v. *State*, 200 Ind. 579, 164 N. E. 274 (1928); *State* v. *Lamb*, 209 Kan. 453, 497 P. 2d 275 (1972); *Bowen* v. *Commonwealth*, 199 Ky. 400, 251 S. W. 625 (1923); *State* v. *Anselmo*, 260 La. 306, 256 So. 2d 98 (1971), cert. denied, 407 U. S. 911 (1972); *Tucker* v. *State*, 244 Md. 488, 224 A. 2d 111 (1966), cert. denied, 386 U. S. 1024 (1967); *State* v. *Brugioni*, 320 Mo. 202, 7 S. W. 2d 262 (1928); *State* v. *English*, 71 Mont. 343, 229 P. 727 (1924); *State* v. *Petillo*, 61 N. J. 165, 293 A. 2d 649 (1972), cert. denied, 410 U. S. 945 (1973); *Doyle* v. *State*, 317 P. 2d 289 (Okla. Crim. App. 1957); *State* v. *Seymour*, 46 R. I. 257, 126 A. 755 (1924), partially overruled on other grounds, *State* v. *LeBlanc*, 100 R. I. 523, 217 A. 2d 471 (1966); *Owens* v. *State*, 217 Tenn. 544, 399 S. W. 2d 507 (1965); *Griffey* v. *State*, 168 Tex. Cr. R. 338, 327 S. W. 2d 585 (1959).

A few state courts do permit impeachment. *McConnell* v. *State*, 48 Ala. App. 523, 266 So. 2d 328, cert. denied, 289 Ala. 746, 266 So. 2d 334 (1972); *Theodor* v. *Superior Court of Orange County*, 8 Cal. 3d 77, 501 P. 2d 234 (1972); *People* v. *Alfinito*, 16 N. Y. 2d 181, 211 N. E. 2d 644 (1965); *Commonwealth* v. *Hall*, 451 Pa. 201, 302 A. 2d 342 (1973).

rule, see *State* v. *McKoy*, 16 N. C. App. 349, 191 S. E. 2d 897 (1972).

Whether a search warrant and its supporting affidavit, adequate on their face, may later be impeached, is squarely presented here. "The time is ripe for a decision on this question, for the courts are in conflict and the question is important to the proper administration of criminal justice." Kipperman, Inaccurate Search Warrant Affidavits as a Ground for Suppressing Evidence, 84 Harv. L. Rev. 825 (1971). (Footnotes omitted.)

No. 73–1353. IRA S. BUSHEY & SONS, INC., ET AL. *v.* UNITED STATES. C. A. 2d Cir. Motion of American Waterways Operators, Inc., for leave to file brief as *amicus curiae* granted. Certiorari denied. Reported below: 487 F. 2d 1393.

No. 73–1425. PENNSYLVANIA *v.* PLATOU. Sup. Ct. Pa. Certiorari denied, it appearing that judgment below rests upon an adequate state ground. Reported below: 455 Pa. 258, 312 A. 2d 29.

No. 73–1441. ROBINSON ET AL. *v.* HAWAII ET AL.; and

No. 73–1442. ALBARADO ET AL. *v.* HAWAII ET AL. Sup. Ct. Hawaii. Motion of Hawaiian Sugar Planters Assn. for leave to file brief as *amicus curiae* granted. Certiorari denied. Reported below: 54 Haw. 174, 504 P. 2d 1330 and 55 Haw. 260, 517 P. 2d 26.

No. 73–1635. HEYNE, COMMISSIONER OF CORRECTION OF INDIANA, ET AL. *v.* NELSON, A MINOR, BY NELSON, ET AL. C. A. 7th Cir. Motion of respondents for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 491 F. 2d 352.

No. 73–1650. KERNER *v.* UNITED STATES; and

No. 73–1651. ISAACS *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. MR. JUSTICE MARSHALL took no

part in the consideration or decision of these petitions. Reported below: 493 F. 2d 1124.

No. 73–1673. COX *v.* CHESAPEAKE & OHIO RAILROAD CO. C. A. 6th Cir. Certiorari denied. MR. JUSTICE POWELL took no part in the consideration or decision of this petition. Reported below: 494 F. 2d 349.

No. 73–6332. REESE ET AL. *v.* CALIFORNIA. Ct. App. Cal., 3d App. Dist. Certiorari denied. MR. JUSTICE DOUGLAS would grant certiorari.

No. 73–6341. HAINES *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. MR. JUSTICE DOUGLAS would grant certiorari. Reported below: 485 F. 2d 564.

No. 73–6403. COLES *v.* CALIFORNIA. Ct. App. Cal., 5th App. Dist. Certiorari denied. MR. JUSTICE DOUGLAS would grant certiorari.

No. 73–6426. HERRELL *v.* CALIFORNIA. Ct. App. Cal., 2d App. Dist. Certiorari denied. MR. JUSTICE DOUGLAS would grant certiorari.

Rehearing Denied

No. 72–1118. ARNETT, DIRECTOR, OFFICE OF ECONOMIC OPPORTUNITY, ET AL. *v.* KENNEDY ET AL., 416 U. S. 134;

No. 73–157. CALERO-TOLEDO ET AL. *v.* PEARSON YACHT LEASING CO., 416 U. S. 663;

No. 73–817. GAMBINO *v.* UNITED STATES, 416 U. S. 982;

No. 73–1050. BIGHEART *v.* PAPPAN, 416 U. S. 937;

No. 73–1163. WALLS *v.* UNITED STATES, 416 U. S. 983;

No. 73–1216. WALDEN ET VIR *v.* UNITED STATES, 416 U. S. 983; and

No. 73–1218. PFEIFER ET AL. *v.* BOARD OF EDUCATION OF THE UPPER SANDUSKY EXEMPTED VILLAGE SCHOOL DISTRICT, 416 U. S. 901. Petitions for rehearing denied.

No. 73–1303. ROSENTHAL ET UX. *v.* COMMISSIONER OF INTERNAL REVENUE, 416 U. S. 984;

No. 73–5842. CIUZIO *v.* UNITED STATES, 416 U. S. 995;

No. 73–6296. THERIAULT *v.* UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT ET AL., 416 U. S. 980;

No. 73–6416. BRADY *v.* NIELSEN, U. S. DISTRICT JUDGE, 416 U. S. 980;

No. 73–6417. BURNS *v.* DECKER ET AL., 416 U. S. 991;

No. 73–6442. DANIELS *v.* MCCARTHY, WARDEN, 416 U. S. 992;

No. 73–6494. JACKSON *v.* NORTON-CHILDREN'S HOSPITALS, INC., ET AL., 416 U. S. 1000; and

No. 73–6633. SCHWARTZ *v.* NEVADA ET AL., *ante*, p. 906. Petitions for rehearing denied.

No. 73–671. MAYER PAVING & ASPHALT CO. ET AL. *v.* GENERAL DYNAMICS CORP. ET AL., 414 U. S. 1146. Motion for leave to file petition for rehearing denied.

No. 73–872. LOUISIANA ET AL. *v.* FEDERAL POWER COMMISSION, 416 U. S. 974. Petition for rehearing denied. MR. JUSTICE POWELL took no part in the consideration or decision of this petition.

Reporter's Note

The next page is purposely numbered 1301. The numbers between 978 and 1301 were intentionally omitted, in order to make it possible to publish in-chambers opinions in the current preliminary print of the United States Reports with *permanent* page numbers, thus making the official citations immediately available.

OPINION OF INDIVIDUAL JUSTICE IN CHAMBERS

WARM SPRINGS DAM TASK FORCE ET AL. *v.* GRIBBLE

ON APPLICATION FOR STAY

No. A–1146. Decided June 17, 1974

Application for stay, pending disposition of appeal by Court of Appeals, of District Court's order denying applicants' motion for a preliminary injunction to halt construction of the Warm Springs Dam Project in California on the ground that the Environmental Impact Statement (EIS) filed by the Army Corps of Engineers concerning the project did not adequately deal with alleged seismic and water poisoning problems presented by the project and failed to comply with the National Environmental Policy Act (NEPA), is granted, the Council on Environmental Quality, the agency ultimately responsible for administration of the NEPA, in a letter applicants filed with this Court, taking the position that the EIS is deficient in the respects noted.

MR. JUSTICE DOUGLAS, Circuit Justice.

Applicants brought an action on March 22, 1974, in the United States District Court for the Northern District of California and sought a preliminary injunction to halt further construction in connection with the Warm Springs Dam-Lake Sonoma Project on Dry and Warm Springs Creeks in the Russian River Basin, Sonoma County, California. The applicants alleged, *inter alia,* that the Environmental Impact Statement filed by the Army Corps of Engineers concerning the project did not comply with the requirements of the National Environmental Policy Act of 1969, 42 U. S. C. § 4321 *et seq.*

A hearing was held in the District Court on the motion for a preliminary injunction. On May 23, 1974, the Dis-

trict Court rendered an oral ruling denying applicants' motion for the injunction.[1] A written opinion was filed thereafter. Applicants filed an application in the Court of Appeals for the Ninth Circuit for an injunction pending appeal, which was denied on May 24, 1974.

Application was then made to me as Circuit Justice for the Ninth Circuit seeking a stay of the order of the District Court as well as a stay restraining further construction work on the Warm Springs Dam Project. Because of the seriousness of the claims made by the applicants, I issued an order, on May 30, 1974, staying further disturbance of the soil in connection with the dam (other than research, investigation, planning and design activity) "pending reconsideration of the application when the memoranda of the Solicitor General and the Environmental Protection Agency are received."

A response has been filed, along with further materials submitted by the applicants supporting their request for a stay. After consideration of these submissions, I have entered an order continuing my earlier stay order pending disposition of the appeal in this case by the Court of Appeals for the Ninth Circuit.

The Warm Springs Dam will be an earth-fill dam, holding back a reservoir of water, across Dry Creek, a major tributary of the Russian River in Sonoma County. The dam was first authorized, in smaller form than is now contemplated, in the Flood Control Act of 1962, Pub. L. 87–874, 76 Stat. 1173, 1192. On January 1, 1970, the National Environmental Policy Act, which requires the filing of an Environmental Impact Statement (EIS) for major federal actions significantly affecting the quality of the human environment, 42 U. S. C. § 4332 (2)(C),

[1] The order did prohibit respondents from disturbing certain archaeological sites pending compliance with Executive Order 11593, 36 Fed. Reg. 8921, 3 CFR 154 (1971 Comp.).

became law. A draft EIS was not distributed until June 1973, and the final EIS was not filed with the Council on Environmental Quality until December 4, 1973. I am informed that approximately $35 million has been expended on the project already, and that another $7 million will be expended before this case will be heard and determined by the Court of Appeals.

The applicants for this stay focus on two extremely serious challenges to the adequacy of the EIS.

First, they note that the dam will sit atop a geologic fault running along Dry Creek. There are other faults nearby. A town of 5,000 people is nestled below the dam and the wall of water it will restrain. At the District Court hearing on applicants' motion for a preliminary injunction, substantial questions were raised about the integrity of the dam should an earthquake occur. There seems to be a recognized "credibility gap" as to the safety of the project; recommendations were received by the Corps from its own staff for further study; and reservations about the safety factor were expressed by the State of California. A contract has been made for further dynamic analysis of the safety of the dam. Should that analysis indicate that the dam is potentially risky, the Corps would have "no choice" but to consider abandoning the entire project. Tr. 1828–1829, 1832.

Second, challenges were made at the hearing to the adequacy of the EIS regarding expected poisoning of water in the reservoir behind the dam. The water will be used by consumers in the surrounding county. There were allegations at the hearing that the waters will be poisoned by mercury carried from an abandoned mercury mine which will be inundated when the dam is built, and that asbestos, fluoride, and boron particles will also leach into the waters. It is contended that the EIS is deficient in its treatment of these significant environmental effects.

The District Court rejected these contentions, finding that the Corps adequately dealt with the seismic problem and the water-poisoning problem. It found the EIS adequate. The Solicitor General argues that the District Court's findings are not "clearly erroneous" and will be upheld by the Court of Appeals, and that therefore I should deny the requested stay.

Here, however, the views of the two federal agencies most intimately familiar with environmental issues and the requirements of the National Environmental Policy Act have been filed with the Court. They undermine the determination of the District Court.

The Environmental Protection Agency (EPA) has written to the Solicitor General expressing some doubt about the treatment of the water-poisoning issues in the final EIS.[2] The EPA goes on to say, however, that:

"We wish to emphasize that the CEQ [Council on

[2] "[C]ertain water quality related issues, which potentially impact the environment and which were not analyzed in the final environmental impact statement, came to light during the hearing on plaintiffs' motion for a preliminary injunction. These issues include potential contamination of the reservoir water by boron and fluoride concentrations in the streams which would feed the reservoir and by asbestos concentrations in the serpentine rock underlying the reservoir site. Moreover, with respect to mercury contamination, we understand from a hasty and admittedly incomplete reading of the transcripts of the hearing and the affidavits submitted, that the Corps has agreed to perform pre-inundation studies to predict the biomagnification effect of mercury concentrations in sediments and algae in the reservoir site.

"We believe that the foregoing issues should have been raised and should have been discussed in the final impact statement. We cannot say, however, because we were not present during the proceedings and have not had sufficient opportunity to review the evidence, that these issues would, at the same time, have caused EPA to express environmental reservations as to the construction of the project, within the context of our own NEPA review procedures." Letter of June 4, 1974, from Alan G. Kirk II, Assistant Administrator

> Environmental Quality] is the Executive Office charged with NEPA administration and ultimately with evaluating the performance of Federal agencies in complying with the Act. We understand that the Council has expressed concern over the adequacy of the final environmental statement on the Warm Springs project and the issues raised by the Council clearly fall under its administrative responsibilities relative to NEPA." Letter of June 4, 1974, from Alan G. Kirk II, Assistant Administrator for Enforcement and General Counsel, Environmental Protection Agency, to Robert H. Bork, Solicitor General.

The applicants have filed with this Court a letter from the General Counsel of the CEQ to the Solicitor General expressing the views of the Council on the adequacy of the Warm Springs Dam final EIS. Letter of June 11, 1974, from Gary Widman, General Counsel, Council on Environmental Quality, to Robert H. Bork, Solicitor General. In that letter, the Council expresses the view that the plaintiffs and the public are likely to be irreparably harmed if an injunction pending appeal is denied. The Council continues:

> "It is the Council's position that the best interests of the Government would be served by halting construction work (excluding environment study and testing) until the appeal is decided on the merits.
>
> "In its letter of February 14, 1974, the Council advised the Corps that its Environmental Impact Statement ('EIS') was not adequate in several respects. The Council asked for further study and consideration of the earthquake hazard, the problems of stimulating population growth in the area,

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for Enforcement and General Counsel, Environmental Protection Agency, to Robert H. Bork, Solicitor General.

the calculation of benefits and costs, and further asked consideration of an alternative project (enlargement of the existing Coyote Dam) that would not raise similar environmental problems. The letter asked the Corps to delay action on the project until such further study and consideration was completed.

"Information revealed at trial strongly reinforced our original reservations about the seismic and other problems, and raised new concerns over potential hazards created by chemicals in the water, and in the fish. In its letter to you, the EPA now agrees that the project's adverse environmental effects were not adequately raised or discussed in the EIS. The alternative projects (one of which was mentioned in our letter of February 14) have apparently not received the further study which we suggested. Therefore, if asked, CEQ would reaffirm its original advice to the Corps, that sound policy would require construction work on this project to be halted, pending further analysis of the problems and consideration of available alternatives."

The Council goes on to express in more detail its reasons for concluding that the EIS is deficient:

"At the hearing in the District Court, plaintiffs questioned highly responsible experts, including one originally retained by the Corps, and others who were associated with State and Federal Government agencies who testified to professional reservations about the hazards that could be created by the dam. . . .

. . . . . .

"Upholding the District Court's finding of adequacy of the statement, and the Court's approval of the Corps decision to proceed, will permit construction

> of a dam in the face of statements by responsible experts that the EIS information is insufficient to answer problems of earthquake hazards created by a fault underlying the dam, and water quality hazards raised by the presence of mercury, boron, fluoride and asbestos in the site area (all of which may be carried into reservoir water by underlying hot springs). Whatever disagreement there may have been on this issue of adequacy of information, the Corps nevertheless stated during and after the hearing that there would be additional studies on the issues of seismicity, water quality and archaeology, and it recognized that the results of those studies may lead to a conclusion that the dam should not be built."

The Council cites numerous ways in which the Warm Springs EIS may flout Council guidelines, including lack of research and analysis supporting its conclusions and lack of presentation of responsible opposing scientific opinion and of critical comments by responsible governmental agencies. It is the view of the CEQ that denial of an injunction could further jeopardize the possibility of obtaining objective agency choice between alternative projects should an appellate court overturn the decision of the District Court,[3] that further construction could

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[3] See *Power Reactor Co.* v. *Electricians*, 367 U. S. 396, 417 (DOUGLAS, J., dissenting):

"But when that point is reached, when millions have been invested, the momentum is on the side of the applicant, not on the side of the public. The momentum is not only generated by the desire to salvage an investment. No agency wants to be the architect of a 'white elephant.'"

See also *Arlington Coalition on Transportation* v. *Volpe*, 458 F. 2d 1323, 1333 (CA4 1972):

"Further investment of time, effort, or money in the proposed route would make alteration or abandonment of the route increasingly

impair the freedom of choice of local voters who will be considering the project, and that "it is both contrary to law and an irreparable detriment to plaintiffs and the public to permit the construction to proceed in such circumstances."

The mandate of the National Environmental Policy Act regarding Environmental Impact Statements is stated in the Senate Report:

> "(c) Each agency which proposes any major actions, such as project proposals, proposals for new legislation, regulations, policy statements, or expansion or revision of ongoing programs, shall make a determination as to whether the proposal would have a significant effect upon the quality of the human environment. If the proposal is considered to have such an effect, then the recommendation or report supporting the proposal must include statements by the responsible official of certain findings as follows:
>
> "(i) A finding shall be made that the environmental impact of the proposed action has been studied and that the results of the studies have been given consideration in the decisions leading to the proposal.
>
> "(ii) Wherever adverse environmental effects are found to be involved, a finding must be made that those effects cannot be avoided by following reasonable alternatives which will achieve the intended purposes of the proposal. Furthermore, a finding

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less wise and, therefore, increasingly unlikely. If investment in the proposed route were to continue prior to and during the Secretary's consideration of the environmental report, the options open to the Secretary would diminish, and at some point his consideration would become a meaningless formality."

must be made that the action leading to the adverse environmental effects is justified by other considerations of national policy and those other considerations must be stated in the finding.

"(iii) Wherever local, short-term uses of the resources of man's environment are being proposed, a finding must be made that such uses are consistent with the maintenance and enhancement of the long-term productivity of the environment.

"(iv) Wherever proposals involve significant commitments of resources and those commitments are irreversible and irretrievable under conditions of known technology and reasonable economics, a finding must be made that such commitments are warranted." S. Rep. No. 91–296, pp. 20–21 (1969).

The tendency has been to downgrade this mandate of Congress, to use shortcuts to the desired end, and to present impact statements after a project has been started, when there is already such momentum that it is difficult to stop. There are even cases where the statement is not prepared by a Government agency but by a contractor who expects to profit from a project.[4] One hesitates to interfere once a project is started, but if the congressional mandate is to be meaningful it must be done here.

As the EPA observed, the CEQ is the Executive Office charged with administration of the National Environmental Policy Act (NEPA) and the Environmental Impact Statements. The NEPA requires all federal agencies both to consult with the CEQ to insure that environmental factors are adequately considered and to assist

[4] See *Life of the Land* v. *Brinegar*, 414 U. S. 1052; *Power Reactor Co.* v. *Electricians*, 367 U. S. 396.

the CEQ. 42 U. S. C. §§ 4332 (2)(B) and (H). The CEQ is given the authority under NEPA to

> "review and appraise the various programs and activities of the Federal Government in the light of the policy set forth in subchapter I of this chapter [which includes the EIS requirement] for the purpose of determining the extent to which such programs and activities are contributing to the achievement of such policy, and to make recommendations to the President with respect thereto." 42 U. S. C. § 4344 (3).

The Council's members must be qualified "to appraise programs and activities of the Federal Government in the light of the policy" set forth in subchapter I of the Act. 42 U. S. C. § 4342.

The Council, ultimately responsible for administration of the NEPA and most familiar with its requirements for Environmental Impact Statements, has taken the unequivocal position that the statement in this case is deficient, despite the contrary conclusions of the District Court. That agency determination is entitled to great weight, see, *e. g.*, *Trafficante* v. *Metropolitan Life Ins.*, 409 U. S. 205, 210; *Griggs* v. *Duke Power Co.*, 401 U. S. 424, 433–434; *Udall* v. *Tallman*, 380 U. S. 1, 16, and it leads me to grant the requested stay pending appeal in the Court of Appeals to maintain the status quo in the construction of the Warm Springs Dam.

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AREA RATE PROCEEDINGS. See **Federal Power Commission,** 1; **Judicial Review,** 5–6.

ARMED FORCES. See also **Appeals,** 1; **Constitutional Law,** II, 1; V, 1; **Post-conviction Relief.**

Reservists—Eligibility for readjustment pay.—The "rounding" provision of 10 U. S. C. § 687 (a)—which provides for readjustment pay for an Armed Forces reservist who is involuntarily released from active duty and has completed, immediately before his release, "at least five years of continuous active duty," computed by multiplying his years of active service by two months' basic pay of his grade at time of release, and further provides that "[f]or the purpose of this subsection— . . . (2) a part of a year that is six months or more is counted as a whole year, and a part of a year that is less than six months is disregarded . . ."—as is clear from the statute's legislative history, applies only in computing amount of readjustment pay, and not in determining eligibility therefor; hence, a reservist must serve a minimum of five full years of continuous active duty before his involuntary release in order to qualify for readjustment benefits. Cass v. United States, p. 72.

ARMY PHYSICIANS. See **Appeals,** 1; **Constitutional Law,** II, 1; V, 1.

ARMY RESERVISTS. See **Armed Forces.**

ASSAULT WITH A DEADLY WEAPON. See **Constitutional Law,** II, 4; **Habeas Corpus.**

ATTORNEYS. See **Constitutional Law,** II, 2; III, 1, 4; IV, 2; VIII.

ATTORNEYS' FEES. See **Constitutional Law,** III, 4; VIII; **Miller Act.**

AUTOMOBILES. See **Constitutional Law,** VI.

BANKRUPTCY ACT.

1. *Income tax refund—Property passing to trustee.*—An income tax refund is "property" that passes to trustee under § 70a (5) of Act, being "sufficiently rooted in the bankruptcy past," and not being related conceptually to future wages for purpose of giving bankrupt wage earner a "fresh start." Kokoszka v. Belford, p. 642.

2. *Income tax refund—Property passing to trustee—Effect of Consumer Credit Protection Act's limitation on wage garnish-*

BANKRUPTCY ACT—Continued.

ment.—Provision in Consumer Credit Protection Act limiting wage garnishment to no more than 25% of a person's aggregate "disposable earnings" for any pay period does not apply to a tax refund, since statutory terms "earnings" and "disposable earnings" are confined to "periodic payments of compensation and [do] not pertain to every asset that is traceable in some way to such compensation." Hence, Act does not limit bankruptcy trustee's right to treat tax refund as property of bankrupt's estate. Kokoszka v. Belford, p. 642.

3. *Railroad reorganization—Setoff—Preference.*—In § 77 railroad reorganization proceeding, Court of Appeals erred in allowing setoff of petitioner trustees' judgment for freight charges against respondent shipper's judgment on counterclaim for cargo loss and damage, since it thereby granted a preference to claim of one creditor that happened to owe freight charges over other creditors that did not, and thus interfered with Reorganization Court's duty under § 77e, 11 U. S. C. § 205 (e), to approve a "fair and equitable plan" that duly recognizes rights of each class of creditors and stockholders and does not discriminate unfairly in favor of any class. Baker v. Gold Seal Liquors, p. 467.

BLANKET CERTIFICATION PROCEDURE. See **Federal Power Commission**, 4.

BREACHES OF COLLECTIVE-BARGAINING AGREEMENTS. See **Jurisdiction; National Labor Relations Board.**

BROKERS. See **Appeals**, 3; **Federal Rules of Civil Procedure.**

BURDENSOME TAXES. See **Constitutional Law**, II, 3, 6, 8.

BUREAU OF INDIAN AFFAIRS. See **Constitutional Law**, II, 7; **Indian Reorganization Act of 1934.**

BUYERS. See **Labor.**

CALIFORNIA. See **Constitutional Law**, III, 2; V, 2–3, 5; **Miller Act; Mootness.**

CARGO LOSS AND DAMAGE. See **Bankruptcy Act**, 3.

CASE OR CONTROVERSY. See **Mootness.**

CASH REGISTERS. See **Constitutional Law**, VII.

CEASE-AND-DESIST ORDERS. See **Judicial Review**, 7.

CEILING RATES FOR NATURAL GAS. See **Federal Power Commission**, 1; **Judicial Review**, 2, 5.

CERTIORARI. See **Constitutional Law**, II, 2; III, 1.

CHANGE IN LAW. See **Post-conviction Relief**, 2–3.

CIRCUIT JUDGES. See **Courts of Appeals.**

CITIES. See **Civil Rights; Constitutional Law**, III, 3.

CIVILIAN SOCIETY. See **Constitutional Law**, II, 1; V, 1.

CIVIL RIGHTS. See also **Constitutional Law**, II, 7; III, 3; **Indian Reorganization Act of 1934.**

1. *Exclusive access to city recreational facilities—Segregated private schools and affiliated groups—Injunction.*—City was properly enjoined from permitting exclusive access to its recreational facilities by segregated private schools and by groups affiliated with such schools. Gilmore v. City of Montgomery, p. 556.

2. *Exclusive use of city recreational facilities—Segregated private schools.*—Exclusive use and control of city recreational facilities, however temporary, by segregated private schools were little different from city's agreement with YMCA to run a "coordinated" but, in effect, segregated recreational program. This use carried brand of "separate but equal" and, in circumstances of this case, was properly terminated by District Court. Gilmore v. City of Montgomery, p. 556.

3. *Exclusive use of city recreational facilities—Segregated private schools—Park desegregation order.*—Using term "exclusive use" as implying that an entire city recreational facility is exclusively, and completely, in possession, control, and use of a private group, and as also implying, without mandating, a decisionmaking role for city in allocating such facilities among private and public groups, city's policy of allocating facilities to segregated private schools, in context of 1959 park desegregation order and subsequent history, created, in effect, "enclaves of segregation" and deprived petitioner Negro citizens of city of equal access to parks and recreational facilities. Gilmore v. City of Montgomery, p. 556.

4. *Use of city recreational facilities—Segregated private groups or nonschool organizations—State action.*—On record, which does not contain sufficient facts upon which to predicate legal judgment as to whether certain uses of city recreational facilities in common by segregated private school groups or exclusively or in common by segregated private nonschool groups contravened parks desegregation order, or school desegregation order, or in some way constitute "state action" ascribing to city discriminatory actions of groups in question, it is not possible to determine whether use of recreational facilities by private school groups in common with others, and by private nonschool organizations, involved city so directly in actions

CIVIL RIGHTS—Continued.
of those users as to warrant court intervention on constitutional grounds. Gilmore v. City of Montgomery, p. 556.

CIVIL RIGHTS ACT OF 1964. See **Indian Reorganization Act of 1934.**

CLASS ACTIONS. See **Appeals,** 3–4; **Federal Rules of Civil Procedure.**

CLAYTON ACT. See **Corporations,** 2–3.

COLLATERAL PROCEEDINGS. See **Post-conviction Relief.**

COLLECTIVE-BARGAINING AGREEMENTS. See **Jurisdiction; Labor; National Labor Relations Act,** 1; **National Labor Relations Board.**

"COMPARABLE" EDUCATIONAL SERVICES. See **Appeals,** 4; **Elementary and Secondary Education Act of 1965; Procedure.**

COMPETITION. See **Constitutional Law,** II, 6, 8.

COMPREHENSIVE DRUG ABUSE PREVENTION AND CONTROL ACT OF 1970. See **Parole.**

COMPUTATION OF RESERVISTS' READJUSTMENT PAY. See **Armed Forces.**

CONDUCT UNBECOMING AN OFFICER AND GENTLEMAN. See **Constitutional Law,** II, 1; V, 1.

CONFLICT OF LAWS. See **United States Arbitration Act,** 2–3.

CONSENT DECREES. See **Special Masters.**

CONSPIRACIES. See also **Evidence,** 2.

Conspiracy to cast fictitious votes—Evidence supporting guilty verdict.—Evidence, in prosecution for conspiracy to cast fictitious votes for federal, state, and local candidates in West Virginia primary election in violation of 18 U. S. C. § 241, amply supports verdict that each of petitioners engaged in conspiracy with intent of having false votes cast for federal candidates. Fact that petitioners' primary motive was to affect result in local rather than federal election has no significance, since although a single conspiracy may have several purposes, if one of them—whether primary or secondary—violates a federal law, conspiracy is unlawful under federal law. That petitioners may have had no purpose to change outcome of federal election is irrelevant, since that is not specific intent required by § 241, but rather intent to have false votes cast and thereby to injure right of all voters in federal election to have their

CONSPIRACIES—Continued.

expressions of choice given full value, without dilution or distortion by fraudulent balloting. Anderson v. United States, p. 211.

CONSTITUTIONAL LAW. See also **Appeals**, 1, 4; **Civil Rights; Evidence**, 1; **Habeas Corpus; Mootness; Special Masters.**

I. Adversary System.

Use of testimony of witness discovered in police interrogation.—Use of testimony of a witness discovered by police as a result of accused's statements under circumstances does not violate any requirements under Fifth, Sixth, and Fourteenth Amendments, relating to adversary system. Michigan v. Tucker, p. 433.

II. Due Process.

1. *Arts. 133 and 134, Uniform Code of Military Justice—Lack of vagueness.*—Articles 133 (punishing "conduct unbecoming an officer and gentleman") and 134 (punishing "all disorders and neglects to the prejudice of good order and discipline in the armed forces") are not unconstitutionally vague under Due Process Clause of Fifth Amendment. Parker v. Levy, p. 733.

2. *Convicted indigent defendant—Right to counsel on discretionary review.*—Due Process Clause of Fourteenth Amendment does not require North Carolina to provide convicted indigent defendant with counsel on his discretionary appeal to State Supreme Court or on his petition for certiorari in this Court. Ross v. Moffitt, p. 600.

3. *Excessive tax.*—Fact that a tax is so excessive as to render a business unprofitable or even threaten its existence furnishes no ground for holding tax unconstitutional, and judiciary should not infer from such fact, alone, a legislative attempt to exercise a forbidden power in form of a seeming tax. Pittsburgh v. Alco Parking Corp., p. 369.

4. *Felony indictment following misdemeanor conviction.*—Indictment in North Carolina on felony charge covering same conduct as misdemeanor for which respondent was previously convicted, contravened Due Process Clause of Fourteenth Amendment, since person convicted of misdemeanor in North Carolina is entitled to pursue his right under state law to trial *de novo* without apprehension that State will retaliate by substituting more serious charge for original one and thus subject him to significantly increased potential period of incarceration. Blackledge v. Perry, p. 21.

5. *Fifth Amendment—Equal protection of the laws—Illegitimate children—Social Security Act—Disability insurance.*—Title 42

CONSTITUTIONAL LAW—Continued.

U. S. C. § 416 (h) (3) (B), as part of statutory scheme whereby illegitimate children unable to meet certain conditions (right to inherit, illegitimacy resulting solely from formal defects in parents' marriage, legitimation under state law) can qualify for disability insurance benefits only if disabled wage-earner parent contributed to child's support or lived with him prior to parent's disability, contravenes Due Process Clause of Fifth Amendment and equal protection of laws guaranteed thereby. Jimenez v. Weinberger, p. 628.

6. *Gross receipts tax on parking lots.*—Ordinance imposing increased 20% tax on gross receipts from parking or storing automobiles at nonresidential parking places, is not unconstitutional, and city was constitutionally entitled to put automobile parker to choice of using other transportation or paying increased tax. Pittsburgh v. Alco Parking Corp., p. 369.

7. *Indian employment preference—No invidious discrimination.*—Employment preference for qualified Indians in Bureau of Indian Affairs provided by Indian Reorganization Act of 1934 does not constitute invidious racial discrimination in violation of Due Process Clause of Fifth Amendment but is reasonable and rationally designed to further Indian self-government. Morton v. Mancari, p. 535.

8. *Tax or revenue-raising measure—Effect of taxing authority's competition.*—Ordinance does not lose its character as a tax or revenue-raising measure and may not be invalidated as too burdensome under Due Process Clause of Fourteenth Amendment merely because taxing authority, directly or through an instrumentality enjoying various forms of tax exemption, competes with taxpayer in a manner that judiciary thinks is unfair, since Due Process Clause does not demand of or permit judiciary to undertake to separate burdensome and nonburdensome taxes or to oversee terms and circumstances under which government or its tax-exempt instrumentalities may compete with private sector. Pittsburgh v. Alco Parking Corp., p. 369.

III. Equal Protection of the Laws.

1. *Convicted indigent defendant—Right to counsel on discretionary review.*—Equal Protection Clause of Fourteenth Amendment does not require North Carolina to provide free counsel for convicted indigent defendants seeking discretionary appeals to State Supreme Court or petition for certiorari in this Court. Ross v. Moffitt, p. 600.

2. *Disability insurance—Exclusion of normal pregnancy.*—California's decision not to insure under its disability insurance program

CONSTITUTIONAL LAW—Continued.

risk of disability resulting from normal pregnancy does not constitute an invidious discrimination violative of Equal Protection Clause. Geduldig v. Aiello, p. 484.

3. *Exclusive use of city recreational facilities—Private segregated schools.*—City's policies of allocating recreational facilities to segregated private schools operated directly to contravene an outstanding school desegregation order, and any arrangement, implemented by state officials at any level, that significantly tends to perpetuate a dual school system, in whatever manner, is constitutionally impermissible. Gilmore v. City of Montgomery, p. 556.

4. *Indigent defendant—State's recoupment of legal defense fees paid.*—Oregon recoupment scheme requiring convicted defendants who are indigent at time of criminal proceedings against them but who subsequently acquire financial means to do so, to repay costs of their legal defense, does not violate Equal Protection Clause of Fourteenth Amendment, since statute retains all exemptions accorded to other judgment debtors, in addition to opportunity to show that recovery of legal defense costs will impose "manifest hardship." Fuller v. Oregon, p. 40.

IV. Fifth Amendment.

1. *Privilege against self-incrimination.*—Police conduct in this case, though failing to afford respondent full measure of procedural safeguards later set forth in *Miranda* v. *Arizona*, 384 U. S. 436, did not deprive respondent of his privilege against self-incrimination since record clearly shows that respondent's statements during police interrogation were not involuntary or result of potential legal sanctions. Michigan v. Tucker, p. 433.

2. *Privilege against self-incrimination—Member of dissolved law partnership.*—Fifth Amendment privilege against self-incrimination is not available to member of dissolved law partnership who had been subpoenaed by grand jury to produce partnership's financial books and records, since partnership, though small, had an institutional identity and petitioner held records in a representative, not a personal, capacity. Privilege is "limited to its historic function of protecting only the natural individual from compulsory incrimination through his own testimony or personal records." Bellis v. United States, p. 85.

V. First Amendment.

1. *Freedom of speech—Arts. 133 and 134 of Uniform Code of Military Justice—Lack of overbreadth.*—Articles 133 (punishing "conduct unbecoming an officer and gentleman") and 134 (punishing

CONSTITUTIONAL LAW—Continued.
"all disorders and neglects to the prejudice of good order and discipline in the armed forces") are not facially invalid because of overbreadth. Parker v. Levy, p. 733.

2. *Freedom of speech—Prison inmates—State prohibition against news media interviews.*—In light of alternative channels of communication that are open to prison inmate appellees (mail, visitation rights, communication with press or public through visitors), regulation of California Department of Corrections prohibiting press and other news media interviews with specific individual inmates, does not constitute a violation of their rights of free speech. Pell v. Procunier, p. 817.

3. *Freedom of speech—Prison inmates—State prohibition against news media interviews.*—A prison inmate retains those First Amendment rights that are not inconsistent with his status as prisoner or with legitimate penological objectives of corrections system, and here restrictions on inmates' free speech rights in regulation of California Department of Corrections prohibiting press and other news media interviews with specific individual inmates must be balanced against State's legitimate interest in confining prisoners to deter crime, to protect society by quarantining criminal offenders for a period of time during which rehabilitative procedures can be applied, and to maintain internal security of penal institutions. Pell v. Procunier, p. 817.

4. *Freedom of the press—Federal prohibition against interviews with prisoners.*—Policy statement of Federal Bureau of Prisons prohibiting personal interviews between newsmen and individually designated inmates of federal medium security and maximum security prisons does not abridge freedom of press that First Amendment guarantees, since "it does not deny the press access to sources of information available to members of the general public," but is merely a particularized application of general rule that nobody may enter prison and designate an inmate whom he would like to visit, unless prospective visitor is a lawyer, clergyman, relative, or friend of that inmate. Saxbe v. Washington Post Co., p. 843.

5. *Freedom of the press—State prohibition against interviews with prisoners.*—Rights of media appellants under First and Fourteenth Amendments are not infringed by regulation of California Department of Corrections prohibiting press and other news media interviews with specific individual prison inmates, which regulation does not deny press access to information available to general public. Newsmen, under California policy, are free to visit both maximum security and minimum security sections of California penal

CONSTITUTIONAL LAW—Continued.
institutions and to speak with inmates whom they may encounter, and (unlike members of general public) are also free to interview inmates selected at random. "[T]he First Amendment does not guarantee the press a constitutional right of special access to information not available to the public generally." Pell v. Procunier, p. 817.

VI. Fourth Amendment.

Warrantless search and seizure of automobile.—Judgment holding that scraping of paint from respondent's car's exterior was search within meaning of Fourth Amendment; that warrantless search, which was not incident to respondent's arrest, was unconsented; and that car's seizure could not be justified on ground that car was an instrumentality of crime in plain view, is reversed. Cardwell v. Lewis, p. 583.

VII. Imports and Exports.

Warehoused goods awaiting exportation—Nonimmunity from state ad valorem tax.—Cash registers and other machines built to foreign buyers' specifications, which were warehoused in Ohio awaiting shipment abroad, title, possession, and control remaining in respondent manufacturer, were not immune from state ad valorem tax, since prospect of eventual exportation, however certain, did not start process of exportation and move machines into export stream, without which immunity from local taxation conferred by Import-Export Clause of Constitution was not available. Kosydar v. National Cash Register Co., p. 62.

VIII. Sixth Amendment.

Right to counsel—Indigent defendant—State's recoupment of legal defense fees paid.—Oregon recoupment law requiring convicted defendants who are indigent at time of criminal prosecution against them but who subsequently acquire financial means to do so, to repay costs of their legal defense, does not infringe upon defendant's right to counsel since knowledge that he may ultimately have to repay costs of legal services does not affect his ability to obtain such services. Challenged statute is thus not similar to provision that "chill[s] the assertion of constitutional rights by penalizing those who choose to exercise them." Fuller v. Oregon, p. 40.

CONSTRUCTION OF STATUTES. See **Armed Forces; Bankruptcy Act,** 1; **Equal Pay Act of 1963,** 2; **Internal Revenue Code,** 1; **Miller Act,** 1; **National Labor Relations Act,** 2; **Parole.**

CONSUMER CREDIT PROTECTION ACT. See **Bankruptcy Act**, 2.

CONTINGENT ESCALATIONS ON FLOWING GAS. See **Federal Power Commission**, 1; **Judicial Review**, 6.

CONTRACTS. See **United States Arbitration Act.**

CONTRIBUTION BETWEEN JOINT TORTFEASORS. See **Admiralty.**

CORPORATE FICTION. See **Corporations**, 2.

CORPORATE MISMANAGEMENT. See **Corporations.**

CORPORATIONS. See also **Internal Revenue Code.**

1. *Action for corporate mismanagement—Deterrence of railroad mismanagement as sufficient ground.*—In action by respondent railroad and its subsidiary for corporate mismanagement of railroad against petitioner and its subsidiary, which, after acquiring 98.3% of railroad's stock, had sold it to another corporation, deterrence of railroad mismanagement is not in itself a sufficient ground for allowing respondents to recover. If such deterrence were only objective, it would suffice if any plaintiff were willing to file a complaint, and no injury or violation of a legal duty to particular plaintiff would have to be alleged. Bangor Punta Operations v. Bangor & A. R. Co., p. 703.

2. *Action for corporate mismanagement—Standing to maintain action against vendor of all or substantially all of stock.*—Equitable principles that a stockholder, who has purchased all or substantially all shares of a corporation from a vendor at a fair price, may not seek to have corporation recover against that vendor for prior corporate mismanagement, and that corporate entity may be disregarded if equity so demands, preclude respondent railroad and its subsidiary from maintaining action for corporate mismanagement of railroad under either federal antitrust and securities laws or state law against petitioner and its subsidiary, which, after acquiring 98.3% of railroad's stock, had sold it to another corporation. Latter corporation, having so purchased stock and alleging no fraud, has no standing in equity to maintain action, and, as principal beneficiary of any recovery and itself estopped from complaining of petitioners' alleged wrongs, cannot avoid command of equity through guise of proceeding in name of respondent corporations which it owns and controls. Bangor Punta Operations v. Bangor & A. R. Co., p. 703.

3. *Action for corporate mismanagement—Unjust enrichment—Windfall recovery.*—In action by respondent railroad and its subsidiary for corporate mismanagement of railroad under federal anti-

CORPORATIONS—Continued.

trust and securities laws and state law against petitioner and its subsidiary, which, after acquiring 98.3% of railroad's stock, had sold it to another corporation, Court of Appeals' assumption that any recovery would necessarily benefit public is unwarranted and also overlooks fact that latter corporation, actual beneficiary of any recovery, would be unjustly enriched since it has sustained no injury. Neither federal antitrust and securities laws nor applicable state laws contemplate a windfall recovery by such corporation in these circumstances. Bangor Punta Operations v. Bangor & A. R. Co., p. 703.

COSTS OF NOTICE IN CLASS ACTION. See **Appeals**, 3; **Federal Rules of Civil Procedure.**

COUNCIL ON ENVIRONMENTAL QUALITY. See **Stays.**

COUNTERCLAIMS. See **Bankruptcy Act**, 3.

COURT OF MILITARY APPEALS. See **Constitutional Law**, II, 1; V, 1.

COURTS-MARTIAL. See **Appeals**, 1; **Constitutional Law**, II, 1; V, 1.

COURTS OF APPEALS. See also **Federal Power Commission**, 1; **Judicial Review**, 1–4, 7.

In banc court—Retired circuit judge—Right to vote for rehearing.—Although 28 U. S. C. § 46 (c) provides that a retired circuit judge may sit on an in banc court rehearing a case in which he participated at original hearing, only regular active service circuit judges are vested with authority to vote whether to rehear a case in banc. Moody v. Albermarle Paper Co., p. 622.

CRIMINAL LAW. See **Conspiracies**; **Constitutional Law**, I; II, 2, 4; III, 1, 4; IV, 1; VI; VIII; **Evidence**; **Habeas Corpus**; **Parole**; **Post-conviction Relief.**

CROSSING PICKET LINES. See **National Labor Relations Act**, 1–2.

DAMAGES. See **Admiralty.**

DATA PROCESSING SYSTEMS. See **Constitutional Law**, VII.

DEBENTURES. See **Internal Revenue Code**, 4.

DEBT DISCOUNTS. See **Internal Revenue Code**, 4.

DEBTORS. See **Constitutional Law**, III, 4; VIII.

DECLARATORY JUDGMENTS. See **Appeals**, 2; **Injunctions.**

DEDUCTIBLE INTEREST. See **Internal Revenue Code**, 1.

DELINQUENTS. See **Post-conviction Relief.**

DESEGREGATION. See **Civil Rights; Constitutional Law,** III, 3.

DESTRUCTION OF CORPORATE PROPERTY BY FIRE. See **Internal Revenue Code,** 1–3.

DIRECT APPEALS. See **Appeals,** 2.

DIRECT RATE REGULATION. See **Federal Power Commission,** 3–4.

DISABILITY INSURANCE. See **Constitutional Law,** II, 5; III, 2; **Mootness.**

DISCIPLINE BY UNION OF SUPERVISOR-MEMBERS. See **National Labor Relations Act.**

DISCRETIONARY APPELLATE REVIEW. See **Constitutional Law,** II, 2; III, 1.

DISCRIMINATION. See **Civil Rights; Constitutional Law,** II, 7; III, 2–3; **Equal Pay Act of 1963,** 1; **Indian Reorganization Act of 1934.**

DISOBEDIENCE OF LAWFUL COMMAND. See **Appeals,** 1.

DISORDERS AND NEGLECTS TO PREJUDICE OF GOOD ORDER AND DISCIPLINE. See **Constitutional Law,** II, 1; V, 1.

DISSOLVED LAW PARTNERSHIPS. See **Constitutional Law,** IV, 2.

DISTRICT COURTS. See **Appeals,** 2; **Injunctions.**

DIVIDED DAMAGES. See **Admiralty.**

DUE PROCESS. See **Constitutional Law,** II; **Habeas Corpus.**

ECONOMIC STRIKES. See **National Labor Relations Act,** 2–3.

EDUCATIONALLY DEPRIVED CHILDREN. See **Appeals,** 4; **Elementary and Secondary Education Act of 1965; Procedure.**

EDUCATION AMENDMENTS OF 1972. See **Indian Reorganization Act of 1934.**

ELECTION CONTESTS. See **Conspiracies; Evidence,** 2.

ELECTRONIC DATA PROCESSING SYSTEMS. See **Constitutional Law,** VII.

ELEMENTARY AND SECONDARY EDUCATION ACT OF 1965. See also **Appeals,** 4; **Procedure.**

Comparable educational services—Role of state and local agencies.—While under Act respondent parents of children attending nonpublic schools are entitled to educational services comparable to

ELEMENTARY AND SECONDARY EDUCATION ACT OF 1965—Continued.

those offered public school children, they are not entitled to any particular form of service, and it is role of state and local agencies, not of federal courts, at least at this stage, to formulate a suitable plan. Wheeler v. Barrera, p. 402.

ELIGIBILITY FOR RESERVISTS' READJUSTMENT PAY. See **Armed Forces.**

EMPLOYER AND EMPLOYEES. See **Constitutional Law,** II, 7; **Equal Pay Act of 1963; Indian Reorganization Act of 1934; Judicial Review,** 7; **Jurisdiction; Labor; National Labor Relations Act; National Labor Relations Board.**

EMPLOYMENT PREFERENCES. See **Constitutional Law,** II, 7; **Indian Reorganization Act of 1934.**

EN BANC COURT OF APPEALS. See **Courts of Appeals.**

ENLARGEMENT OF NLRB CEASE-AND-DESIST ORDERS. See **Judicial Review,** 7.

ENVIRONMENTAL IMPACT STATEMENTS. See **Stays.**

EQUAL EMPLOYMENT OPPORTUNITIES ACT OF 1972. See **Indian Reorganization Act of 1934.**

EQUAL PAY ACT OF 1963.

1. *Male and female employees—Base-wage difference—Night shift differential.*—Petitioner employer violated Act by paying higher base wage to male night shift inspectors than it paid to female inspectors performing same tasks on day shift, where higher wage was paid in addition to separate night shift differential paid to all employees for night work. Petitioner did not cure violation by permitting women to work as night shift inspectors, since violation could not have been cured except by equalizing base wages of female day inspectors with higher rates paid night inspectors. Nor was violation cured when petitioner equalized day and night inspector wage rates, since "red circle" rate (higher rate paid employees hired prior to certain date when working as night shift inspectors) perpetuated discrimination. Corning Glass Works v. Brennan, p. 188.

2. *Working conditions—Physical surroundings.*—Statutory term "working conditions" within meaning of 29 U. S. C. § 206 (d) (1)—which provides that in order to establish violation of Act, it must be shown that employer pays different wages to employees of opposite sexes "for equal work on jobs the performance of which requires equal skill, effort and responsibility, and which are performed under similar working conditions"—as is clear from Act's legislative history,

EQUAL PAY ACT OF 1963—Continued.
encompasses only physical surroundings and hazards and not time of day worked. Corning Glass Works v. Brennan, p. 188.

EQUAL PROTECTION OF THE LAWS. See **Civil Rights; Constitutional Law,** III.

EQUITY. See **Corporations,** 2; **Judicial Review,** 4, 7.

ESTABLISHMENT CLAUSE. See **Appeals,** 4.

EVIDENCE. See also **Conspiracies; Constitutional Law,** I; IV, 1; **Judicial Review,** 2–4.

1. *Evidence derived from police interrogation—Admissibility.*—Evidence derived from police interrogation—incriminating testimony of witness discovered by police as result of accused's statements—was admissible. Police's failure, prior to *Miranda* v. *Arizona,* 384 U. S. 436, to advise respondent of his right to appointed counsel under all circumstances of this case involved no bad faith and would not justify recourse to exclusionary rule which is aimed at deterring willful or negligent deprivation of accused's rights. Failure to advise respondent of his right to appointed counsel had no bearing upon reliability of witness' testimony, which was subjected to normal testing process of an adversary trial. Michigan v. Tucker, p. 433.

2. *Out-of-court statements—Admissibility—Prosecution for conspiracy to cast fictitious votes.*—Out-of-court statements made by two of petitioners at election contest hearing were admissible, under basic principles of law of evidence and conspiracy, at petitioners' trial for conspiracy to cast fictitious votes for federal, state, and local candidates in West Virginia primary election in violation of 18 U. S. C. § 241, to prove that the two petitioners had perjured themselves at the election contest hearing, regardless of whether or not § 241 encompasses conspiracies to cast fraudulent votes in state and local elections. Statements were not hearsay, since they were not offered in evidence to prove truth of matter asserted; hence their admissibility was governed by rule that acts of one alleged conspirator can be admitted into evidence against other conspirators, if relevant to prove existence of conspiracy, even though they may have occurred after conspiracy ended. Anderson v. United States, p. 211.

EXCESSIVE TAXES. See **Constitutional Law,** II, 3, 6, 8.

EXCESS ORGANIZATIONAL COSTS. See **Judicial Review,** 7.

EXCHANGES OF SECURITIES. See **Internal Revenue Code,** 4.

EXCLUSIONARY RULE. See **Constitutional Law,** IV, 1; **Evidence,** 1.

"EXCLUSIVE USE" OF RECREATIONAL FACILITIES. See **Civil Rights; Constitutional Law,** III, 3.

EXECUTIVE ORDERS. See **Indian Reorganization Act of 1934.**

EXEMPTIONS FROM DIRECT RATE REGULATION. See **Federal Power Commission,** 3–4.

EXEMPTIONS OF DEBTORS. See **Constitutional Law,** III, 4.

EXPORTS AND IMPORTS. See **Constitutional Law,** VII.

FACE-TO-FACE PRESS-INMATE INTERVIEWS. See **Constitutional Law,** V, 2–5.

FACIAL INVALIDITY. See **Constitutional Law,** II, 1; V, 1.

FAILURE TO REPORT FOR INDUCTION. See **Post-conviction Relief.**

FAIR AND EQUITABLE PLAN. See **Bankruptcy Act,** 3.

FAIR LABOR STANDARDS ACT. See **Equal Pay Act of 1963.**

FALSE VOTES. See **Conspiracies; Evidence,** 2.

FEDERAL-AID-TO-EDUCATION PROGRAMS. See **Appeals,** 4; **Elementary and Secondary Education Act of 1965; Procedure.**

FEDERAL BUREAU OF PRISONS. See **Constitutional Law,** V, 4.

FEDERAL EMPLOYMENT. See **Constitutional Law,** II, 7; **Indian Reorganization Act of 1934.**

FEDERAL HOUSING PROJECTS. See **Miller Act,** 1, 3.

FEDERAL POWER COMMISSION. See also **Judicial Review,** 1–6.

1. *Authority to adopt superseding order—Effect of affirmance of superseded order.*—FPC had statutory authority to adopt 1971 order establishing new area natural gas rate structure superseding 1968 order, notwithstanding Court of Appeals' affirmance of 1968 order. Mobil Oil Corp. v. FPC, p. 283.

2. *Natural Gas Act—"Just and reasonable" rates—Market prices.*—FPC lacks authority to rely exclusively on market prices as final measure of "just and reasonable" rates mandated by Act; moreover, FPC order exempting small producers from direct rate regulation made no finding as to actual impact market price increases would have on consumer gas expenditures. FPC v. Texaco Inc., p. 380.

3. *Small natural gas producers—Order exempting from direct rate regulation—Ambiguity.*—It is not clear from wording of FPC's Order No. 428, which exempted existing and future natural gas sales

FEDERAL POWER COMMISSION—Continued.

by "small producers" from direct rate regulation, that it satisfies statutory requirement that sale price for gas sold in interstate commerce be just and reasonable; at least, order is too ambiguous to satisfy standard of clarity that an administrative order must exhibit, and implication that reasonableness of small producers' rates would be judged by assertion that FPC "would consider all relevant factors" in determining whether proposed rates comported with "public convenience and necessity," is insufficient to sustain order. FPC v. Texaco Inc., p. 380.

4. *Small natural gas producers—Rates—Indirect regulation.*—Scheme for regulating small natural gas producer rates indirectly did not exceed FPC's statutory authority. FPC v. Texaco Inc., p. 380.

FEDERAL PRISONERS. See **Constitutional Law,** V, 5; **Post-conviction Relief.**

FEDERAL RULES OF CIVIL PROCEDURE. See also **Appeals,** 3.

1. *Class action—Cost of notice.*—Plaintiff in class action under Fed. Rule Civ. Proc. 23 must bear cost of notice to members of his class, and it was improper for District Court, after finding in preliminary hearing on merits that plaintiff was "more than likely" to prevail at trial, to impose part of cost on defendants. There is nothing in either language or history of Rule 23 that gives court any authority to conduct preliminary inquiry into merits of suit in order to determine whether it may be maintained as class action, and, indeed, such a procedure contravenes Rule by allowing representative plaintiff to secure benefits of class action without first satisfying requirements of Rule. Where, as here, relationship between parties is truly adversary, plaintiff must pay for cost of notice as part of ordinary burden of financing his own suit. Eisen v. Carlisle & Jacquelin, p. 156.

2. *Class action—Noncompliance with notice requirement.*—District Court's resolution of notice problems in class action under Fed. Rule Civ. Proc. 23 by proposing a notification scheme providing for individual notice to only a limited number of prospective class members and notice by publication to remainder, failed to comply with notice requirement of Rule 23 (c)(2). Express language and intent of Rule 23 (c)(2) leave no doubt that individual notice must be sent to all class members who can be identified through reasonable effort. Here there was nothing to show that individual notice could not be mailed to each of two and a quarter million class members whose names and addresses were easily ascertainable, and for these class

FEDERAL RULES OF CIVIL PROCEDURE—Continued.
members individual notice was clearly "best notice practicable" within meaning of Rule 23 (c)(2). Eisen v. Carlisle & Jacquelin, p. 156.

FEDERAL-STATE RELATIONS. See **Appeals**, 4; **Constitutional Law**, VII; **Elementary and Secondary Education Act of 1965**; **Jurisdiction**; **Miller Act**, 1–2; **National Labor Relations Board**; **Procedure.**

FEES. See **Constitutional Law**, III, 4; VIII.

FELONIES. See **Constitutional Law**, II, 4; **Habeas Corpus.**

FEMALE EMPLOYEES. See **Equal Pay Act of 1963**, 1.

FICTITIOUS VOTES. See **Conspiracies**; **Evidence**, 2.

FIFTH AMENDMENT. See **Constitutional Law**, II, 7; IV; **Evidence**, 1.

FINAL DECISIONS. See **Appeals**, 3.

FINANCIAL RECORDS. See **Constitutional Law**, IV, 2.

FIRE INSURANCE. See **Internal Revenue Code**, 1, 3.

FIRST AMENDMENT. See **Appeals**, 4; **Constitutional Law**, II, 1; V.

FLORIDA. See **Appeals**, 2; **Injunctions**; **Jurisdiction**; **National Labor Relations Board.**

FOREIGN SHIPMENTS. See **Constitutional Law**, VII.

FORFEITURES. See **Parole**, 1.

FORUM-SELECTION CLAUSES. See **United States Arbitration Act**, 2–3.

FOURTEENTH AMENDMENT. See **Civil Rights**; **Constitutional Law**, I; II, 2–4, 6, 8; III; IV, 1; V, 2–3, 5; VI; VIII; **Evidence**, 1; **Habeas Corpus.**

FOURTH AMENDMENT. See **Constitutional Law**, VI.

FRAUDULENT BALLOTING. See **Conspiracies**; **Evidence**, 2.

FREEDOM OF RELIGION. See **Appeals**, 4.

FREEDOM OF SPEECH. See **Constitutional Law**, II, 1; V, 1–3.

FREEDOM OF THE PRESS. See **Constitutional Law**, V, 4–5.

FREIGHT CHARGES. See **Bankruptcy Act**, 3.

GAS PRODUCERS. See **Federal Power Commission**, 1, 3–4; **Judicial Review**, 2, 4–6.

GENERAL ARTICLES OF UNIFORM CODE OF MILITARY JUSTICE. See **Constitutional Law,** II, 1; V, 1.

GENERAL SAVING CLAUSE. See **Parole.**

GOVERNMENT CONTRACTS. See **Miller Act.**

GRAND JURIES. See **Constitutional Law,** IV, 2.

GROSS RECEIPTS TAX. See **Constitutional Law,** II, 6.

GUILTY PLEAS. See **Constitutional Law,** II, 4; **Habeas Corpus.**

HABEAS CORPUS. See also **Constitutional Law,** II, 4.

Guilty plea as bar to constitutional claim.—Since North Carolina, having chosen originally to proceed against respondent on misdemeanor charge in State District Court, was precluded by Due Process Clause of Fourteenth Amendment from even prosecuting respondent in Superior Court for more serious felony charge based on same conduct, respondent's guilty plea to felony charge did not bar him from raising in federal habeas corpus proceeding his claim that felony indictment deprived him of due process. Blackledge v. Perry, p. 21.

HEARSAY. See **Evidence,** 2.

ILLEGITIMATE CHILDREN. See **Constitutional Law,** II, 5.

IMMUNITY FROM TAXATION. See **Constitutional Law,** VII.

IMPORTS AND EXPORTS. See **Constitutional Law,** VII.

IMPOUNDMENT OF AUTOMOBILES. See **Constitutional Law,** VI.

IN BANC COURT OF APPEALS. See **Courts of Appeals.**

INCENTIVE PROGRAMS. See **Federal Power Commission,** 1; **Judicial Review,** 1.

INCOME TAXES. See **Internal Revenue Code,** 1, 4.

INCOME TAX REFUNDS. See **Bankruptcy Act,** 1–2.

INCREASED NATURAL GAS RATES. See **Federal Power Commission,** 1; **Judicial Review,** 1, 4.

INDIAN EMPLOYMENT PREFERENCES. See **Constitutional Law,** II, 7; **Indian Reorganization Act of 1934.**

INDIAN REORGANIZATION ACT OF 1934. See also **Constitutional Law,** II, 7.

Indian employment preference—Effect of Equal Employment Opportunities Act of 1972.—In enacting Equal Employment Opportunities Act of 1972, Congress did not intend to repeal employment

INDIAN REORGANIZATION ACT OF 1934—Continued.

preference for qualified Indians in Bureau of Indian Affairs provided by Indian Reorganization Act of 1934, and District Court erred in holding that it was implicitly repealed by § 11 of 1972 Act proscribing racial discrimination in most federal employment. Morton v. Mancari, p. 535.

INDICTMENTS. See **Constitutional Law,** II, 4; **Habeas Corpus.**

INDIGENTS. See **Constitutional Law,** II, 2; III, 1, 4; VIII.

INDIRECT RATE REGULATION. See **Federal Power Commission,** 3–4.

INDIVIDUAL NOTICE IN CLASS ACTION. See **Appeals,** 3; **Federal Rules of Civil Procedure.**

INDUCTION. See **Post-conviction Relief.**

INJUNCTIONS. See also **Civil Rights,** 1–2; **Constitutional Law,** III, 3.

Three-judge court—Denial of injunction—Propriety.—Three-judge District Court, which entered declaratory judgment holding state abortion statute unconstitutional, properly refused to issue injunction against enforcement of statute, where there was no allegation or proof that State would not acquiesce in declaratory judgment. Poe v. Gerstein, p. 281.

INMATES. See **Constitutional Law,** V, 2–5.

INSTRUCTIONS TO JURY. See **Conspiracies.**

INTEREST DEDUCTIONS. See **Internal Revenue Code,** 4.

INTERNAL REVENUE CODE.

1. *Corporate property—Destruction by fire—Occurrence prior to liquidation—Taxability of gain from fire insurance proceeds.*—When a fire destroys insured corporate property *prior* to corporation's adoption of a complete plan of liquidation, but fire insurance proceeds are received within 12 months after plan's adoption, gain realized from excess of such proceeds over corporate taxpayer's adjusted income tax basis in insured property must be recognized and taxed to corporation, and is not entitled to nonrecognition under § 337 (a) of 1954 Code, which provides, with certain exceptions, for nonrecognition of gain or loss from a corporation's "sale or exchange" of property that takes place during 12-month period following corporation's adoption of a plan for complete liquidation effectuated within that period. Central Tablet Mfg. Co. v. United States, p. 673.

INTERNAL REVENUE CODE—Continued.

2. *Corporate property—Involuntary conversion by fire—Occurrence prior to liquidation—Inapplicability of § 337 (a) of Code.*—Section 337 (a) of 1954 Code was enacted in order to eliminate technical and formalistic determinations as to identity of vendor, as between liquidating corporation and its shareholders, and, therefore, reasons for applying § 337 (a) are not present in situation where involuntary conversion of corporate property by fire takes place prior to adoption of liquidation plan when there is no question as to identity of owner. Central Tablet Mfg. Co. v. United States, p. 673.

3. *Corporate property—Involuntary conversion by fire—Sale or exchange—Occurrence prior to liquidation.*—Involuntary conversion of corporate property by fire, recognized as a "sale or exchange" under § 337 (a) of 1954 Code, takes place when fire occurs prior to adoption of liquidation plan, and not at some post-plan point, such as subsequent settlement of insurance claims or their payment, since fire is single irrevocable event that fixes contractual obligation precipitating transformation of property, over which corporation possesses all incidents of ownership, into a chose in action against insurer. Central Tablet Mfg. Co. v. United States, p. 673.

4. *Corporate taxpayer—Exchange of securities—Debt discount—Deductible interest.*—Respondent corporate taxpayer did not incur amortizable debt discount upon issuance, pursuant to recapitalization plan, of $50 face value 5% sinking fund debentures in exchange for its outstanding unlisted $50 par 5% cumulative preferred shares, and hence was not entitled on its income tax returns to deduct such claimed debt discount under § 163 (a) of Code as interest paid on indebtedness. Alteration in form of retained capital did not give rise to any cost of borrowing to respondent, since cost of capital invested in respondent was same whether represented by preferred or by debentures, and was totally unaffected by market value of preferred shares received in exchange. Commissioner v. Nat. Alfalfa Dehydrating, p. 134.

INTERNATIONAL CHAMBER OF COMMERCE. See **United States Arbitration Act.**

INTERNATIONAL CONTRACTS. See **United States Arbitration Act.**

INTERSTATE CONTESTS. See **Special Masters.**

INTERSTATE SALES OF NATURAL GAS. See **Federal Power Commission; Judicial Review, 1–6.**

INTERVENING CHANGE IN LAW. See **Post-conviction Relief**, 2–3.

INTERVIEWS WITH PRISONERS. See **Constitutional Law**, V, 2–5.

INVESTIGATORS' FEES. See **Constitutional Law**, III, 4; VIII.

INVIDIOUS CLASSIFICATIONS. See **Constitutional Law**, II, 7; III, 2, 4; VIII.

INVOLUNTARY CONVERSION BY FIRE. See **Internal Revenue Code**, 2–3.

INVOLUNTARY RELEASE FROM ACTIVE DUTY. See **Armed Forces.**

JOINT TORTFEASORS. See **Admiralty.**

JOURNALISTS. See **Constitutional Law**, V, 2–5.

JUDGMENT DEBTORS. See **Constitutional Law**, III, 4; VIII.

JUDICIAL REVIEW. See also **Federal Power Commission**, 1.

1. *Court of Appeals—Federal Power Commission—Natural gas rates.*—Court of Appeals did not err in concluding that FPC "acted within the bounds of administrative propriety in abandoning as a pragmatic adjustment" distinction in maximum permissible natural gas rates between casinghead gas and gas-well gas so far as new dedications are concerned, even though casinghead gas was formerly treated as a byproduct of oil and therefore costed and priced lower than gas-well gas. Mobil Oil Corp. v. FPC, p. 283.

2. *Court of Appeals—Federal Power Commission—Natural gas rates—Substantial-evidence standard.*—In arguing that minimum natural gas rates provided by FPC's 1971 order to be paid by producers to pipelines for transportation of liquids and liquefiable hydrocarbons are not supported by substantial evidence, petitioner Mobil Oil Corp. has not met its burden of demonstrating that Court of Appeals misapprehended or grossly misapplied substantial-evidence standard. Mobil Oil Corp. v. FPC, p. 283.

3. *Court of Appeals—Federal Power Commission's moratoria on new natural gas rates—Substantial-evidence standard.*—Court of Appeals' conclusion, contrary to petitioner Mobil Oil Corp.'s contention, that FPC's fixing of moratoria on new natural gas rate filings was supported by required findings of fact and by substantial evidence, did not misapprehend or grossly misapply substantial-evidence standard. Mobil Oil Corp. v. FPC, p. 283.

4. *Court of Appeals—Power to authorize Federal Power Commission to reopen natural gas rate order.*—Under circumstances

JUDICIAL REVIEW—Continued.

where Court of Appeals' affirmance of FPC's 1968 order establishing area natural gas rate structure was not "unqualified" or final, and such order had not been made effective but was stayed until withdrawn in 1971 order, Court of Appeals' action in authorizing FPC to reopen 1968 order did not exceed court's powers under § 19 (b) of Natural Gas Act "to affirm, modify, or set aside [an] order in whole or in part," or constitute an improper exercise of court's equity powers with which it is vested in reviewing FPC orders. Mobil Oil Corp. v. FPC, p. 283.

5. *Federal Power Commission order establishing area natural gas rate structure—Challenges to price levels—Lack of merit.*—Challenges of petitioners—a natural gas producer, New York Public Service Commission, and group of municipally owned gas distributors—to establish price levels for natural gas under FPC's 1971 order are without merit. Mobil Oil Corp. v. FPC, p. 283.

6. *Federal Power Commission order establishing area natural gas rate structure—Claims of discriminatory rates—Lack of merit.*—Claims of all three petitioners—a natural gas producer, New York Public Service Commission, and group of municipally owned gas distributors—with respect to both contingent escalations on flowing gas and refund credits provided for in 1971 FPC order, that even if the 1971 rates are sufficient to satisfy Natural Gas Act's minimum requirements as to amount and, on basis of FPC's chosen methodology, are supported by substantial evidence, they are nevertheless unduly discriminatory and therefore unlawful under §§ 4 and 5 of Act, are without merit. Mobil Oil Corp. v. FPC, p. 283.

7. *National Labor Relations Board cease-and-desist order—Court of Appeals—Power to enlarge.*—Court of Appeals, although properly refusing to resolve inconsistencies in NLRB's decisions in this case and in *Tüdee Products, Inc.*, 194 N. L. R. B. 1234, by accepting Board counsel's rationalizations, erroneously exercised its authority under §§ 10 (e) and (f) of National Labor Relations Act to "make and enter a decree . . . modifying and enforcing as so modified" an NLRB order. It was "incompatible with the orderly function of the process of judicial review" for that court to enlarge NLRB unfair practice cease-and-desist order against employer by requiring employer to reimburse union for litigation expenses and excess organizational costs, without first affording NLRB an opportunity to evaluate this case in light of policy enunciated in *Tüdee* and to decide whether that policy should be applied retroactively. NLRB v. Food Store Employees, p. 1.

JURISDICTION. See also **Appeals**, 2; **National Labor Relations Board.**

1. *State courts—Collective-bargaining disputes.*—State-court jurisdiction over collective-bargaining disputes does not turn upon particular type of relief sought, and therefore is not limited to claims for damages, rather than injunctive relief. William E. Arnold Co. v. Carpenters, p. 12.

2. *Suits under § 301 of Labor Management Relations Act—Effect of National Labor Relations Board's authority.*—When activity in question is arguably both an unfair labor practice prohibited by § 8 of National Labor Relations Act and a breach of a collective-bargaining agreement, NLRB's authority "is not exclusive and does not destroy the jurisdiction of the courts in suits under § 301" of LMRA. Pre-emption doctrine of *San Diego Building Trades Council* v. *Garmon*, 359 U. S. 236, is not relevant to actions within purview of § 301, which may be brought in either state or federal courts. William E. Arnold Co. v. Carpenters, p. 12.

JURISDICTIONAL-DISPUTE STRIKES. See **Jurisdiction; National Labor Relations Board.**

JURISDICTIONAL SALES OF NATURAL GAS. See **Federal Power Commission**, 3–4.

JUST AND REASONABLE NATURAL GAS RATES. See **Federal Power Commission**, 2; **Judicial Review**, 6.

LABOR. See also **Equal Pay Act of 1963; Judicial Review**, 7; **Jurisdiction; National Labor Relations Act; National Labor Relations Board.**

Successor employer—Requirement as to arbitration with union.—Where petitioner, after purchasing assets of restaurant and motor lodge under agreement whereby it expressly did not assume any of sellers' obligations, including those under collective-bargaining agreement, hired 45 employees, but only nine of sellers' 53 former employees and none of former supervisors, petitioner was not required to arbitrate with respondent union, which had collective-bargaining agreements with sellers containing arbitration provisions, since there was plainly no substantial continuity of identity in work force hired by petitioner with that of sellers, and no express or implied assumption of agreement to arbitrate. Petitioner had right not to hire any of sellers' employees, if it so desired, and this right cannot be circumvented by union's asserting its claims in a suit under § 301 of Labor Management Relations Act to compel arbitration rather than in unfair labor practice context. Howard Johnson Co. v. Hotel Employees, p. 249.

LABOR MANAGEMENT RELATIONS ACT. See **Jurisdiction**, 2; **Labor**; **National Labor Relations Board.**

LABOR UNION'S DISCIPLINE OF SUPERVISOR-MEMBERS. See **National Labor Relations Act.**

LAW PARTNERSHIPS. See **Constitutional Law**, IV, 2.

LAWS OF THE UNITED STATES. See **Post-conviction Relief**, 1.

LEGAL DEFENSE FEES. See **Constitutional Law**, III, 4; VIII.

LIQUIDATION PLANS. See **Internal Revenue Code**, 1–3.

LITIGATION EXPENSES. See **Judicial Review**, 7.

LOCAL EDUCATIONAL AGENCIES. See **Appeals**, 4; **Elementary and Secondary Education Act of 1965**; **Procedure.**

LOCAL ELECTIONS. See **Conspiracies**; **Evidence**, 2.

LONGSHOREMEN'S AND HARBOR WORKERS' ACT. See **Admiralty.**

MAINE. See **Corporations.**

MALE EMPLOYEES. See **Equal Pay Act of 1963**, 1.

MANUAL FOR COURTS-MARTIAL. See **Constitutional Law**, II, 1; V, 1.

MARINE CORPS RESERVISTS. See **Armed Forces.**

MARITIME LAW. See **Admiralty.**

MARKET PRICES. See **Federal Power Commission**, 2–4.

MEMBERS OF DISSOLVED LAW PARTNERSHIPS. See **Constitutional Law**, IV, 2.

MILITARY SERVICE. See **Post-conviction Relief.**

MILITARY SOCIETY. See **Constitutional Law**, II, 1; V, 1.

MILLER ACT.

1. *Subcontractor—Relationship with prime contractor.*—Based on substantiality and importance of its relationship with petitioner prime contractor, company, which defaulted on its payments to respondent for plywood called for by company's contract with petitioner to supply exterior plywood for federal housing project in California, was clearly a subcontractor for purposes of Act, considering not just its plywood contract with petitioner but also its contract with petitioner for custom millwork on project. Moreover, company and petitioner had closely interrelated management and

MILLER ACT—Continued.

financial structures, and their relationship on California project was same as on many other similar projects; hence it would have been easy for petitioner to secure itself from loss as result of company's default. F. D. Rich Co. v. United States ex rel. Industrial Lumber Co., p. 116.

2. *Suit under Act—Award of attorneys' fees.*—Attorneys' fees were not properly awarded respondent as prevailing party in its suit under Act against petitioner prime contractor and its surety. Court of Appeals erred in construing Act to require award by reference to "public policy" of State in which suit was brought, since Act provides federal cause of action and there is no evidence of any congressional intent to incorporate state law to govern such an important element of litigation under Act as liability for attorneys' fees. Provision in 40 U. S. C. § 270b (a) that claimants should recover "sums justly due," does not require award of attorneys' fees on asserted ground that without such fee shifting, claimants would not be fully compensated. To hold otherwise would amount to judicial obviation of "American Rule" that attorneys' fees are not ordinarily recoverable in federal litigation in absence of a statute or contract providing therefor, in context of everyday commercial litigation, where policies which underlie limited judicially created departures from rule are inapplicable. F. D. Rich Co. v. United States ex rel. Industrial Lumber Co., p. 116.

3. *Suit under Act—Venue requirements.*—Where contract between subcontractor and respondent for lumber called for by subcontractor's contract with petitioner prime contractor to supply exterior plywood for federal housing project in California was executed in California, all materials thereunder to be delivered to California worksite, and California remained site for performance of original contract despite diversion of one shipment of plywood to South Carolina for another project, venue for respondent's suit under Act on South Carolina as well as California shipments, brought after subcontractor defaulted on payments, properly lay in Eastern District of California, since there was clearly a sufficient nexus for satisfaction of venue requirements of 40 U. S. C. § 270b (b). F. D. Rich Co. v. United States ex rel. Industrial Lumber Co., p. 116.

MINIMUM NATURAL GAS RATES. See **Federal Power Commission,** 1; **Judicial Review,** 2.

MIRANDA WARNINGS. See **Constitutional Law,** IV, 1; **Evidence,** 1.

MISDEMEANORS. See **Constitutional Law,** II, 4; **Habeas Corpus.**

MISSOURI. See **Appeals,** 4; **Elementary and Secondary Education Act of 1965; Procedure.**

MOOTNESS. See also **Constitutional Law,** III, 2.

Disability insurance—Exclusion of pregnancies—Effect of appellate ruling and administrative guidelines.—In action challenging constitutionality of California disability insurance system excluding certain disabilities attributable to pregnancy, appellate ruling and administrative guidelines excluding only normal pregnancies have mooted case as to three appellees who had abnormal pregnancies and whose claims have now been paid. Geduldig v. Aiello, p. 484.

MORATORIA ON NATURAL GAS RATE INCREASES. See **Federal Power Commission,** 1; **Judicial Review,** 3–4.

MOTOR LODGES. See **Labor.**

MOTOR VEHICLES. See **Constitutional Law,** VI.

MULTI-TIERED APPELLATE SYSTEMS. See **Constitutional Law,** II, 2, 4; **Habeas Corpus.**

MUNICIPAL CORPORATIONS. See **Civil Rights; Constitutional Law,** III, 3.

MURDER. See **Constitutional Law,** VI.

NARCOTICS OFFENDERS. See **Parole.**

NATIONAL ENVIRONMENTAL POLICY ACT. See **Stays.**

NATIONAL LABOR RELATIONS ACT. See also **Judicial Review,** 7; **Jurisdiction,** 2; **National Labor Relations Board.**

1. *Purpose of § 8 (b) (1) (B) of Act—Union's discipline of supervisor-members as violation.*—Both language and legislative history of § 8 (b) (1) (B) reflect a clear congressional concern with protecting employers in selection of representatives to engage in two particular and explicitly stated activities, *viz.*, collective bargaining and adjustment of grievances. Therefore, a union's discipline of supervisor-members can violate § 8 (b) (1) (B) only when it may adversely affect supervsors' conduct in performing duties of, and acting in capacity of, grievance adjusters or collective bargainers, in neither of which capacities supervisors involved in these cases were acting when they crossed picket lines to perform rank-and-file work. Florida Power & Light v. Electrical Workers, p. 790.

2. *Unfair labor practice—Union's discipline of supervisor-members.*—A union does not commit an unfair labor practice under § 8

NATIONAL LABOR RELATIONS ACT—Continued.

(b)(1)(B) of Act when it disciplines supervisor-members for crossing a picket line and performing rank-and-file struck work during a lawful economic strike against employer. Florida Power & Light v. Electrical Workers, p. 790.

3. *Union's discipline of supervisor-members—Rank-and-file work during strike—Assurance of supervisors' loyalty to employer.*—Concern that to permit a union to discipline supervisor-members for performing rank-and-file work during an economic strike will deprive employer of those supervisors' full loyalty, is a problem that Congress addressed, not through § 8 (b)(1)(B), but through §§ 2 (3), 2 (11), and 14 (a) of Act, which, while permitting supervisors to become union members, assure employer of his supervisors' loyalty by reserving in him rights to refuse to hire union members as supervisors, to discharge supervisors for involvement in unon activities or union membership, and to refuse to engage in collective bargaining with supervisors. Florida Power & Light v. Electrical Workers, p. 790.

NATIONAL LABOR RELATIONS BOARD. See also **Judicial Review**, 7; **Jurisdiction**, 2.

Policy—Conduct arguably both unfair labor practice and contract violation—Jurisdictional dispute—Settlement procedure.—NLRB policy is to refrain from exercising jurisdiction as to conduct which is arguably both an unfair labor practice and a contract violation when, as here, parties have voluntarily established by contract a binding settlement procedure. When particular contract violations also involve an arguable violation of § 8 (b)(4)(i)(D) of National Labor Relations Act involving jurisdictional disputes, NLRB has recognized added policy justifications for deferring to contractual dispute mechanism, as indicated by § 10 (k) of NLRA, which by its special procedure for NLRB resolution of charges involving jurisdictional disputes "not only tolerates but actually encourages" settlement of such disputes. William E. Arnold Co. v. Carpenters, p. 12.

NATURAL GAS ACT. See **Federal Power Commission; Judicial Review**, 1–6.

NEGROES. See **Civil Rights; Constitutional Law**, III, 3.

NEWS MEDIA. See **Constitutional Law**, V, 2–5.

NEW YORK STOCK EXCHANGE. See **Appeals**, 3; **Federal Rules of Civil Procedure.**

NIGHT SHIFTS. See **Equal Pay Act of 1963.**

NONCOLLISION MARITIME CASES. See **Admiralty.**

NONLEGITIMATED ILLEGITIMATE CHILDREN. See **Constitutional Law**, II, 5.

NONPUBLIC SCHOOLS. See **Appeals**, 4; **Civil Rights**; **Elementary and Secondary Education Act of 1965**; **Procedure.**

NONRECOGNITION OF GAIN FROM SALE OR EXCHANGE. See **Internal Revenue Code**, 1.

NONRESIDENTIAL PARKING PLACES. See **Constitutional Law**, II, 6.

NORMAL PREGNANCIES. See **Constitutional Law**, III, 2; **Mootness.**

NORTH CAROLINA. See **Constitutional Law**, II, 2, 4; III, 1; **Habeas Corpus.**

NO-STRIKE CLAUSES. See **Jurisdiction**, 2; **National Labor Relations Board.**

NOTICE BY PUBLICATION IN CLASS ACTION. See **Appeals**, 3; **Federal Rules of Civil Procedure.**

NOTICE COSTS IN CLASS ACTION. See **Appeals**, 3; **Federal Rules of Civil Procedure.**

NUISANCES. See **Special Masters.**

ODD-LOT TRADERS. See **Appeals**, 3; **Federal Rules of Civil Procedure.**

OFFSTREET PARKING FACILITIES. See **Constitutional Law**, II, 6.

OHIO. See **Constitutional Law**, VII.

ON-THE-PREMISES NONPUBLIC SCHOOL INSTRUCTION. See **Appeals**, 4; **Elementary and Secondary Education Act of 1965**; **Procedure.**

ORIGINAL JURISDICTION. See **Special Masters.**

OUT-OF-COURT STATEMENTS. See **Evidence**, 2.

OVERBREADTH. See **Constitutional Law**, V, 1.

PARKING LOTS. See **Constitutional Law**, II, 6.

PARKS. See **Civil Rights**; **Constitutional Law**, III, 3.

PAROCHIAL SCHOOLS. See **Appeals**, 4; **Elementary and Secondary Education Act of 1965**; **Procedure.**

PAROLE.

1. *Narcotics offender—Parole eligibility—General saving clause.*—Board of Parole is barred by general saving clause, 1 U. S. C. § 109 (which provides that "[t]he repeal of any statute shall not have the effect to release or extinguish any penalty, forfeiture, or liability incurred under such statute . . ."), from considering for parole respondent, who had been sentenced for a narcotics violation and was ineligible for parole under 26 U. S. C. § 7237 (d), which was subsequently repealed by Comprehensive Drug Abuse Prevention and Control Act of 1970, since it is clear that Congress intended ineligibility for parole in § 7237 (d) to be treated as part of offender's "punishment," and therefore prohibition against offender's eligibility for parole under general parole statute, 18 U. S. C. § 4202, is a "penalty, forfeiture, or liability" under saving clause. Warden v. Marrero, p. 653.

2. *Narcotics offender—Parole eligibility—Saving clause of Comprehensive Drug Abuse Prevention and Control Act of 1970.*—Saving clause of Act, which provides that "[p]rosecutions" for narcotics violations before May 1, 1971, shall not be affected by repeals of statutory provisions, bars Board of Parole from considering for parole, under general parole statute, 18 U. S. C. § 4202, respondent, who had been sentenced for narcotics violation before May 1, 1971, and was ineligible for parole under 26 U. S. C. § 7237 (d), which was repealed by 1970 Act, since parole eligibility, as a practical matter, is determined at time of sentencing, and sentencing is a part of concept of "prosecution" saved by § 1103 (a). Warden v. Marrero, p. 653.

PARTNERSHIPS. See **Constitutional Law,** IV, 2.

PENALTIES. See **Parole.**

PERSONAL INJURIES. See **Admiralty.**

PERSONAL PROPERTY TAXES. See **Constitutional Law,** VII.

PICKET LINES. See **National Labor Relations Act.**

PIPELINES. See **Federal Power Commission,** 2–4; **Judicial Review,** 2, 6.

POLICE IMPOUNDMENT OF AUTOMOBILES. See **Constitutional Law,** VI.

POLICY STATEMENT OF FEDERAL BUREAU OF PRISONS. See **Constitutional Law,** V, 4.

POLLUTION. See **Special Masters.**

POST-CONVICTION RELIEF.

1. *Claim grounded "in the laws of the United States."*—Fact that petitioner's claim is grounded "in the laws of the United States" rather than in Constitution does not preclude its assertion in a proceeding under 28 U. S. C. § 2255, particularly since § 2255 permits a federal prisoner to assert a claim that his conviction is "in violation of the Constitution *or laws* of the United States." Davis v. United States, p. 333.

2. *Intervening change in law—Cognizable issue.*—Issue that petitioner raises—that Court of Appeals in another case effected change in law after affirmance of his conviction and that such holding required that his conviction be set aside—is cognizable in a proceeding under 28 U. S. C. § 2255. Davis v. United States, p. 333.

3. *Issue raised in prior appeal—Effect of new law.*—Even though legal issue raised in a prior direct appeal from petitioner's conviction was determined against petitioner, he is not precluded from raising issue in a proceeding under 28 U. S. C. § 2255 "if new law has been made . . . since the trial and appeal." Davis v. United States, p. 333.

PRE-EMPTION. See **Jurisdiction**, 2; **National Labor Relations Board.**

PREFERENCES IN BANKRUPTCY. See **Bankruptcy Act**, 3.

PREFERENCES IN EMPLOYMENT. See **Constitutional Law**, II, 7; **Indian Reorganization Act of 1934.**

PREFERRED STOCK. See **Internal Revenue Code**, 4.

PREGNANCIES. See **Constitutional Law**, III, 2; **Mootness.**

PRIMARY ELECTIONS. See **Conspiracies**; **Evidence**, 2.

PRIME CONTRACTORS. See **Miller Act.**

PRISONER-PRESS INTERVIEWS. See **Constitutional Law**, V, 2–5.

PRISONERS. See **Constitutional Law**, II, 4; V, 2–5; **Habeas Corpus**; **Post-conviction Relief.**

PRIVACY. See **Constitutional Law**, VI.

PRIVATE SCHOOLS. See **Appeals**, 4; **Elementary and Secondary Education Act of 1965**; **Procedure.**

PRIVATE SEGREGATED CLUBS OR ORGANIZATIONS. See **Civil Rights**; **Constitutional Law**, III, 3.

PRIVATE SEGREGATED SCHOOLS. See **Civil Rights**; **Constitutional Law**, III, 3.

PRIVILEGE AGAINST SELF-INCRIMINATION. See **Constitutional Law,** I; IV; **Evidence,** 1.

PROBATION. See **Constitutional Law,** III, 4; VIII.

PROCEDURAL SAFEGUARDS. See **Constitutional Law,** I; IV, 1; **Evidence,** 1.

PROCEDURE. See also **Appeals,** 3–4; **Elementary and Secondary Education Act of 1965; Federal Rules of Civil Procedure; Special Masters.**

Elementary and Secondary Education Act of 1965—Decision as to on-premises nonpublic school remedial instruction—Effect of stage of proceedings.—At this stage of proceedings this Court cannot reach and decide whether Title I of Act requires assignment of publicly employed teachers to provide remedial instruction during regular school hours on premises of private schools attended by Title I eligible students. While Court of Appeals correctly ruled that District Court erred in denying relief where it appeared that petitioner state school officials had failed to comply with Act's comparability requirement, Court of Appeals' opinion is not to be read to effect that petitioners *must* submit and approve plans that employ use of Title I teachers on private school premises during regular school hours. Wheeler v. Barrera, p. 402.

PROCESS OF EXPORTATION. See **Constitutional Law,** VII.

PRODUCERS OF NATURAL GAS. See **Federal Power Commission; Judicial Review,** 1–6.

PROPERTY PASSING TO BANKRUPTCY TRUSTEE. See **Bankruptcy Act,** 1–2.

PUBLICATION NOTICE IN CLASS ACTION. See **Appeals,** 3; **Federal Rules of Civil Procedure.**

PUBLIC INTEREST. See **Federal Power Commission,** 1; **Judicial Review,** 4.

PUBLIC NUISANCES. See **Special Masters.**

PUBLIC PARKING LOTS. See **Constitutional Law,** II, 6.

PUBLIC PARKS. See **Civil Rights; Constitutional Law,** III, 3.

PURCHASERS. See **Labor.**

RACIAL DISCRIMINATION. See **Civil Rights; Constitutional Law,** II, 7; **Indian Reorganization Act of 1934.**

RAILROAD MISMANAGEMENT. See **Corporations.**

RAILROAD REORGANIZATIONS. See **Bankruptcy Act,** 3.

RANK-AND-FILE STRUCK WORK. See **National Labor Relations Act**, 2–3.

RAPE. See **Constitutional Law**, I; IV, 1; **Evidence**, 1.

RATES FOR NATURAL GAS. See **Federal Power Commission**; **Judicial Review**, 1–6.

RATIONAL CLASSIFICATIONS. See **Constitutional Law**, II, 5, 7.

RATIONALITY. See **Constitutional Law**, II, 7.

READJUSTMENT PAY FOR RESERVISTS. See **Armed Forces.**

REAL PARTIES IN INTEREST. See **Corporations**, 2–3.

REASONABLENESS. See **Constitutional Law**, II, 7.

RECAPITALIZATION PLANS. See **Internal Revenue Code**, 4.

RECOUPMENT. See **Constitutional Law**, III, 4; VIII.

RECREATIONAL PROGRAMS. See **Civil Rights**, 2; **Constitutional Law**, III, 3.

REFUND WORKOFF CREDITS. See **Federal Power Commission**, 1; **Judicial Review**, 1–2, 4.

REHEARINGS. See **Courts of Appeals.**

REIMBURSEMENT OF EXCESS ORGANIZATIONAL COSTS. See **Judicial Review**, 7.

REIMBURSEMENT OF LITIGATION EXPENSES. See **Judicial Review**, 7.

REMEDIAL INSTRUCTION. See **Appeals**, 4; **Elementary and Secondary Education Act of 1965**; **Procedure.**

REORGANIZATION OF RAILROADS. See **Bankruptcy Act**, 3.

REPEAL BY IMPLICATION. See **Indian Reorganization Act of 1934.**

RESERVES OF NATURAL GAS. See **Federal Power Commission**, 1; **Judicial Review**, 1–6.

RESERVISTS' READJUSTMENT PAY. See **Armed Forces.**

RESTAURANTS. See **Labor.**

RETIRED CIRCUIT JUDGES. See **Courts of Appeals.**

REVENUE-RAISING MEASURES. See **Constitutional Law**, II, 8.

RIGHT OF PRIVACY. See **Constitutional Law**, VI.

RIGHT TO COUNSEL. See **Constitutional Law**, II, 2; III, 1, 4; IV, 1; VIII; **Evidence**, 1.

RIGHT TO VOTE FOR IN BANC REHEARING. See **Courts of Appeals.**

"ROUNDING" PROVISION. See **Armed Forces.**

RULES OF CIVIL PROCEDURE. See **Appeals**, 3; **Federal Rules of Civil Procedure.**

SALE OR EXCHANGE. See **Internal Revenue Code**, 1, 3.

SALES. See **Labor.**

SALES CONTRACTS. See **United States Arbitration Act**, 1–2.

SAVING CLAUSES. See **Parole.**

SCHOOL DESEGREGATION. See **Civil Rights**; **Constitutional Law**, III, 3.

SCHOOLS. See **Appeals**, 4; **Elementary and Secondary Education Act of 1965**; **Procedure.**

SEARCHES AND SEIZURES. See **Constitutional Law**, VI.

SEARCHES OF AUTOMOBILE'S EXTERIOR. See **Constitutional Law**, VI.

SECURITIES EXCHANGE ACT OF 1934. See **Appeals**, 3; **Corporations**, 2–3; **Federal Rules of Civil Procedure**; **United States Arbitration Act**, 4.

SEGREGATED PRIVATE CLUBS OR ORGANIZATIONS. See **Civil Rights**; **Constitutional Law**, III, 3.

SEGREGATED PRIVATE SCHOOLS. See **Civil Rights**; **Constitutional Law**, III, 3.

SEGREGATED PUBLIC PARKS. See **Civil Rights**; **Constitutional Law**, III, 3.

SEGREGATED RECREATIONAL FACILITIES. See **Civil Rights**; **Constitutional Law**, III, 3.

SELECTIVE SERVICE REGULATIONS. See **Post-conviction Relief.**

SELF-INCRIMINATION. See **Constitutional Law**, I; IV; **Evidence**, 1.

SELLERS. See **Labor.**

SETOFFS. See **Bankruptcy Act**, 3.

SETTLEMENT PROCEDURES. See **National Labor Relations Board.**

SEX DISCRIMINATION. See **Equal Pay Act of 1963,** 1.

SHERMAN ACT. See **Appeals,** 3; **Federal Rules of Civil Procedure.**

SHIPPING. See **Admiralty.**

SIXTH AMENDMENT. See **Constitutional Law,** I; III, 4; IV, 1; VIII; **Evidence,** 1.

SMALL GAS PRODUCERS. See **Federal Power Commission,** 3–4.

SOCIAL SECURITY ACT. See **Constitutional Law,** II, 5.

SOUTHERN LOUISIANA AREA. See **Federal Power Commission,** 1; **Judicial Review,** 1–6.

SPECIAL FORCES. See **Appeals,** 1; **Constitutional Law,** II, 1; V, 1.

SPECIAL MASTERS.

Action between States—Consent decree—Effect of lack of findings or rulings.—On bill of complaint by Vermont charging New York and paper company with polluting Lake Champlain, impeding navigation, and creating public nuisance, this Court will not approve consent decree proposed by Special Master to be entered without further argument or hearing and calling for appointment of another Special Master to police its execution and propose to Court resolution of any future issues. There have been no findings of fact nor rulings either as to equitable apportionment of water involved or as to whether New York and paper company are responsible for public nuisance, and proposed new Special Master's procedure would materially change Court's function in interstate contests so that in supervising execution of decree it would be acting more in arbitral than judicial manner and might be considering proposals having no relation to law or to Court's Art. III function. Vermont v. New York, p. 270.

SPECIAL TEACHING SERVICES. See **Appeals,** 4; **Elementary and Secondary Education Act of 1965; Procedure.**

SPURIOUS CLAIMS. See **Constitutional Law,** II, 5.

STATE ACTION. See **Civil Rights,** 4; **Constitutional Law,** III, 3.

STATE COURTS. See **Jurisdiction; National Labor Relations Board.**

STATE EDUCATIONAL AGENCIES. See **Appeals,** 4; **Elementary and Secondary Education Act of 1965; Procedure.**

STATE ELECTIONS. See **Conspiracies; Evidence,** 2.

STATUTORY CONSTRUCTION. See **Armed Forces; Bankruptcy Act,** 1–2; **Equal Pay Act of 1963,** 2; **Internal Revenue Code,** 1–3; **Miller Act,** 1; **National Labor Relations Act; Parole.**

STAYS. See also **United States Arbitration Act.**

Denial of injunction against construction of dam—Environmental Impact Statement.—Application for stay, pending disposition of appeal by Court of Appeals, of District Court's order denying applicants' motion for a preliminary injunction to halt construction of Warm Springs Dam Project in California on ground that Environmental Impact Statement filed by Army Corps of Engineers concerning project did not adequately deal with alleged seismic and water poisoning problems presented by project and failed to comply with National Environmental Policy Act, is granted, Council on Environmental Quality, in a letter applicants filed with this Court, taking position that EIS is deficient in respects noted. Warm Springs Dam Task Force v. Gribble (DOUGLAS, J., in chambers), p. 1301.

STOCKHOLDERS. See **Corporations.**

STRIKES. See **Jurisdiction; National Labor Relations Act; National Labor Relations Board.**

SUBCONTRACTORS. See **Miller Act,** 1, 3.

SUBPOENAS DUCES TECUM. See **Constitutional Law,** IV, 2.

SUBSTANTIAL-EVIDENCE STANDARD. See **Judicial Review,** 2–3.

SUCCESSOR EMPLOYERS. See **Labor.**

SUPERVISOR-MEMBERS OF UNION. See **National Labor Relations Act.**

SUPPRESSION OF EVIDENCE. See **Constitutional Law,** VI.

SUPREME COURT. See also **Appeals,** 2; **Constitutional Law,** II, 2; III, 1; **Special Masters.**

Assignment of Mr. Justice Clark (retired) to the United States Court of Appeals for the Eighth Circuit, p. 937.

TAX DEDUCTIONS. See **Internal Revenue Code,** 4.

TAXES. See **Constitutional Law,** II, 3, 6, 8; VII; **Internal Revenue Code.**

TAX REFUNDS. See **Bankruptcy Act,** 1–2.

THREE-JUDGE COURTS. See **Appeals,** 2; **Injunctions.**

TRADEMARKS. See **United States Arbitration Act.**

TRIALS DE NOVO. See **Constitutional Law,** II, 4; **Habeas Corpus.**

TRUSTEES IN BANKRUPTCY. See **Bankruptcy Act,** 1–2.

TWO-TIERED APPELLATE PROCESS. See **Constitutional Law,** II, 4; **Habeas Corpus.**

UNEMPLOYMENT COMPENSATION. See **Constitutional Law,** III, 2; **Mootness.**

UNFAIR COMPETITION. See **Constitutional Law,** II, 8.

UNFAIR LABOR PRACTICES. See **Judicial Review,** 7; **Jurisdiction; Labor; National Labor Relations Act; National Labor Relations Board.**

UNIFORM CODE OF MILITARY JUSTICE. See **Appeals,** 1; **Constitutional Law,** II, 1; V, 1.

UNIONS. See **Judicial Review,** 7; **Jurisdiction; Labor; National Labor Relations Board.**

UNION'S DISCIPLINE OF SUPERVISOR-MEMBERS. See **National Labor Relations Act.**

UNITED STATES ARBITRATION ACT.

1. *International contract—Enforcement of arbitration clause.*—Arbitration clause in international sales contract between respondent American manufacturer and petitioner German citizen is to be respected and enforced by federal courts in accord with explicit provisions of Act that an arbitration agreement, such as is here involved, "shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for revocation of any contract." 9 U. S. C. §§ 1, 2. Scherk v. Alberto-Culver Co., p. 506.

2. *International contract—Enforcement of arbitration clause.*—An agreement to arbitrate before a specified tribunal is, in effect, a specialized kind of forum-selection clause that posits not only situs of suit but also procedure to be used in resolving dispute, and invalidation of arbitration clause in this case, wherein clause was contained in international sales contract between respondent American manufacturer and petitioner German citizen, would not only allow respondent to repudiate its solemn promise but would, as well, reflect a "parochial concept that all disputes must be resolved under our laws and in our courts." Scherk v. Alberto-Culver Co., p. 506.

3. *International contract—Necessity for forum-selection clause.*—Since uncertainty will almost inevitably exist with respect to any contract, such as one in question here, with substantial contacts in

UNITED STATES ARBITRATION ACT—Continued.

two or more countries, each with its own substantive laws and conflict-of-laws rules, a contractual provision specifying in advance forum for litigating disputes and law to be applied is an almost indispensable precondition to achieving orderliness and predictability essential to any international business transaction. Such a provision obviates danger that a contract dispute might be submitted to a forum hostile to interests of one of the parties or unfamiliar with problem area involved. Scherk v. Alberto-Culver Co., p. 506.

4. *International contract—Violations of securities laws.*—In context of an international contract, advantages that a security buyer might possess in having a wide choice of American courts and venue in which to litigate his claims of violations of securities laws, become chimerical, since an opposing party may by speedy resort to a foreign court block or hinder access to American court of buyer's choice. Scherk v. Alberto-Culver Co., p. 506.

UNJUST ENRICHMENT. See **Corporations**, 2–3.

VAGUENESS. See **Constitutional Law**, II, 1.

VALID GOVERNMENTAL INTERESTS. See **Constitutional Law**, II, 5.

VENUE. See **Miller Act**, 3.

VESSELS. See **Admiralty.**

VIETNAM. See **Appeals**, 1; **Constitutional Law**, II, 1; V, 1.

VINDICTIVENESS AGAINST ACCUSED. See **Constitutional Law**, II, 4; **Habeas Corpus.**

VOTING. See **Conspiracies**; **Evidence**, 2.

WAGES. See **Equal Pay Act of 1963.**

WAREHOUSED GOODS. See **Constitutional Law**, VII.

WARM SPRINGS DAM PROJECT. See **Stays.**

WARRANTIES. See **United States Arbitration Act.**

WARRANTLESS SEARCHES AND SEIZURES. See **Constitutional Law**, VI.

WATER POLLUTION. See **Special Masters.**

WEST VIRGINIA. See **Conspiracies**; **Evidence**, 2.

WHEELER-HOWARD ACT. See **Constitutional Law**, II, 7; **Indian Reorganization Act of 1934.**

WINDFALL RECOVERIES. See **Corporations**, 3.

WITNESSES. See **Constitutional Law,** I; IV, 1; **Evidence,** 1.

WORDS AND PHRASES.

1. *"Disposable earnings."* 15 U. S. C. § 1673 (Consumer Credit Protection Act). Kokoszka v. Belford, p. 642.

2. *"Final decision."* 28 U. S. C. § 1291. Eisen v. Carlisle & Jacquelin, p. 156.

3. *"Penalty, forfeiture, or liability."* 1 U. S. C. § 109 (general saving clause). Warden v. Marrero, p. 653.

4. *"Property."* § 70a (5), Bankruptcy Act, 11 U. S. C. § 110 (a)(5). Kokoszka v. Belford, p. 642.

5. *"Prosecutions."* § 1103 (a), Comprehensive Drug Abuse Prevention and Control Act of 1970, note following 21 U. S. C. § 171. Warden v. Marrero, p. 653.

6. *"Sale or exchange."* § 337 (a), Internal Revenue Code of 1954, 26 U. S. C. § 337 (a). Central Tablet Mfg. Co. v. United States, p. 673.

7. *"Subcontractor."* § 270b (a), Miller Act, 40 U. S. C. § 270b (a). F. D. Rich Co. v. United States ex rel. Industrial Lumber Co., p. 116.

8. *"Working conditions."* Equal Pay Act of 1963, 29 U. S. C. § 206 (d)(1). Corning Glass Works v. Brennan, p. 188.

WORKING CONDITIONS. See **Equal Pay Act of 1963,** 2.

YMCA. See **Civil Rights,** 2; **Constitutional Law,** III, 3.